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LURKING DANGERS WHICH ARE NOT HEEDED.

When are our states going to wake up to the fact that due process of law is government itself and that there is nothing so certain to create discontent in the states than the maladministration of the law—"the law's delays." We have called attention heretofore to the fact that nine months' delay in the trial of civil appeals cases in England was regarded as a "scandalous delay." In some of our states, the courts are from two to three years behind, as well as the United States Supreme Court. In many cases this condition is a practical denial of justice. That it should take two years to reach a case after it has been appealed to any court, is a gross outrage. In many instances poor opinion, are rendered because the courts are rushed with work. Every effort on the part of our bar associations should be exercised to secure the best material available for the bench, both *nisi prius* and in our courts of appeal. Enough judges should be added so that it will be considered a scandalous delay if a case is not disposed of in nine months after being appealed. It is a wonder that the people have been so patient. We get into ruts and before we can get out of them general history proclaims that we must hear.

"It is, it is the cannon's opening roar?"

These delays are caused both on account of the accumulation of business and mediocre ability. Our judges are growing to be automatons. They want cases on all fours and a "mule case" at that. If they meet a principle in the road and it makes an effort to assert itself, they regard it as an assumption, and some of these judges have been heard to exclaim: "I never heard of you before and I trust it will not be my misfortune to meet you again;" and with self-satisfied complacency move on a way lighted up with cases on all fours decided wrong on principle. "If the light," in our bench and bar, "be darkness, how great is that darkness." The spirit which giveth life is entirely wanting in many decisions and there seems to be a disposition to so assert the letter as to "kill," for the sake of killing. The matter of construction, which lies above everything in a judge, seems to have, as a rule, become a lost art, but how can we expect anything else from a bench and bar fed on canned law. Such kind of food is almost enough to induce the elements of the buffoon, which appear in some of our decisions. So with buffoonery, spirit killing construction, and no construction but canned law construction, we find the bar growing restive and the general public breaking out under the strain. Justice becomes a by-word and anarchy finds a field to gloat in. Somebody has said a "state's supreme court will reflect the ability of its bar." When Erskine was England's great advocate, Mansfield was a great judge and Mansfield cleared away the debris which had been clogging the way to justice, by a vigorous use of the maxims woven into magnificent construction; nor was England without other great judges at the time.

America had her Marshall and her Webster as well as her Story, her Kent, her Shaw and her David Dudley Field. All these were deeply versed in principles and shone forth magnificently in construction.

True we have called attention several times, in this Journal, to the conditions, and yet we see our legislatures meeting and neglecting to form any definite plan for their reformation, conditions which have become a menace to our best interests in the government of our states and which are in fact also a menace to the general government.

We now most earnestly call attention to our readers of the necessity of action. These matters are such that they must not be put off. It seems strange that our bar associations do not appreciate the fearful menace to our most sacred institution. Nothing is so important as confidence in a nation's judiciary and nothing more serious than a loss of confidence in it. We are beginning to hear constant complaint. And why not, when it takes more than three years before a case from inception to the courts of appeal may be heard. It would seem as though there were some interests of some kind which were at work to prevent the necessary legislation to bring in such plainly needed reforms. The peril of

such conditions should be proclaimed again and again till we see that action is being taken and something actually done to remedy the evils which have been gathering in our systems of due process of law.

NOTES OF IMPORTANT DECISIONS.

APPEAL AND ERROR—REVIEW OF JUDGMENT BASED ON A DIRECTED VERDICT WHERE BOTH PARTIES REQUEST A DIRECTION IN THEIR FAVOR.—It is an interesting point of practice upon which the Supreme Court of North Dakota touches in the recent case of Larson v. Calder, 113 N. W. Rep. 103, where that court holds that where both parties in a trial move for a directed verdict, they by so doing waive their right to go to the jury and agree to submit all questions of fact to the court; and that in all such instances the action of the trial court would be treated as the verdict of a jury and sustained, on appeal, unless there is an absence of any facts in the evidence on which to base it. The court's observations on this point in the case are as follows: "The next question is whether the court erred in directing a verdict after both parties had rested, and both appellant and respondent had made motions for a directed verdict. It is well established that in such cases both parties waive any right to a submission of the case to the jury, and that the findings of the court are thereby substituted for the verdict of the jury, that all questions which could properly have been submitted to the jury are thereby submitted to the court for its decision. Therefore it will be seen that appellant has no ground for complaint, because the question as to the statement on the sale being a warranty was not submitted to the jury. The court took the place of the jury, and was entitled to take into consideration all the facts and circumstances surrounding the sale precisely the same as it would have been the duty of the jury to do, and there is no evidence that the court did not do so. The court having acted upon the motions of both parties, and having directed a verdict for the respondent, appellant cannot now say that the court erred in its decision, unless there was an absence of any fact on which to base it. There is ample authority for its finding that the statement made was a warranty. Stanford v. McGill, N. Dak. 536, 72 N. W. Rep. 938, 38 L. R. A. 760, and cases cited; 6 Enc. Pl. & Pr. 703."

The foregoing is the statement of a rule of law not very often applied, and as far as the decisions go not at all applied outside of the jurisdiction of the federal court and the courts of the state of New York. It is therefore rather extravagant for the court in the principal case to make the statement that the rule is well established. It is true that in New York there is a long line of cases holding to this rule and that the federal courts, including the United States Supreme Court, have adopted it, but the Supreme Court of Wisconsin in Calder v. Crowley, 74 Wis. 157, has questioned its soundness. The New York authorities which are responsible for the great weight of authority on this question are very clear and unequivocal. Thus in Leggett v. Hyde, 58 N. Y. 272, the court said: "At the trial each party asked the court to direct a verdict in his favor. Each thereby conceded that there could be no dispute upon any question of fact. Each thereby conceded that there was left for decision only a question of law, and that it arose upon a settled and uncontradicted state of facts." This rule of the New York courts is based upon the rule sustained by earlier authorities in that state, to-wit: that where parties have by motion for a nonsuit or by resting their defenses upon certain propositions of law, waived their right to go to the jury, they are estopped from making the point in an appellate court that there were questions of fact to be passed upon by the jury. 2 Thompson on Trials, § 2272; O'Neill v. James, 43 N. Y. 84; Winchell v. Hicks, 18 N. Y. 558; Trustees v. Kirk, 68 N. Y. 459. Judge Thompson in his work on Trials states this rule to be peculiar to New York.

In the later case of Koehler v. Adler, 78 N. Y. 287, the court stated the general rule laid down in the Leggett case, *supra*, as we have already started it, and then limited its extent by holding that the presumption of waiver in such cases is repelled when the party whose request is denied thereupon asks to go to the jury upon certain specified questions of fact. This rule, however, is then extended to its full length in the case of Dillon v. Cockeroft, 90 N. Y. 649, by giving to the finding of the court the effect of a verdict of a jury, the court saying: "The motion to dismiss the complaint was equivalent to a request to direct a verdict in favor of the defendant. Such being the case the parties by the motions made, each of them, virtually agreed to submit the question of facts to the judge and under such circumstances, if there is any evidence to uphold the decision, it is not error." So also in the next case of Stratford v. Jones, 97 N. Y. 586, the court said: "The evidence raised a question of fact, which might have been submitted to the jury. No request to that effect was made, but both parties requested the court to direct a verdict. Under these circumstances it has been held that parties must be deemed to have submitted the questions of fact, if any, to the decision of the court, and waived the right to go to the jury. The decision of the court, therefore, stands in the place of a verdict of the jury. The evidence being such that a verdict for the defendants could have been sustained, the direction to find such verdict was not error under the circumstances." The rule in the federal court, now applied in every jurisdiction is based on the decision in the case of Beuttell v. Magone, 157 U. S. 154, where Justice White sustains the New

York rule and extends its operation to the federal courts.

We are not satisfied in our own mind as to what correct principle of procedure it is possible to point to in order to give a satisfactory reason for the existence of this rule. It seems to us, on the other hand, that this rule so insidiously grafted into our law of procedure is a clear departure from ancient landmarks and correct principle. The great case of Farnum v. Davidson, 57 Mass. (3 Cush.) 232, decided by that celebrated court over which the learned Chief Justice Shaw presided, is familiar to every student of American common law procedure. In that case the court held that it was proper for a trial judge to refuse to rule, *at the request of both parties*, that certain facts in evidence do or do not amount, in law, to a demand upon the maker of a promissory note, so as to charge an indorser; the proper course being to instruct the jury what is necessary to constitute a legal demand, and to leave it to them to determine, upon the evidence, whether such a demand has been made or not. The court said: "The error, which runs through the whole case, and seems to have been common to both parties, is in considering evidence as facts. It is undoubtedly true, that it is for the court to apply the law to the facts, and to declare their legal effect, where there is question or controversy in regard to them. But the fact of a demand was the very matter in issue, and the point of controversy; and the court was asked not to apply law to facts, but to pronounce upon the evidence. Both parties requested the court to decide, whether the evidence amounted in law to a demand on the maker of the note; that is, whether the evidence proved a demand. The judge certainly most properly referred that matter to the jury to whom it belonged, and gave them as is admitted, full, correct and satisfactory instructions as to the law of the case."

FEDERAL REGULATION OF INSURANCE.

A Corporation as a Citizen.—As was said by Mr. Justice Strong,[1] a corporation itself can be a citizen of no state in the sense in which the word "citizen" is used in the Constitution of the United States. A suit by or against a corporation is regarded as a suit by or against the stockholders of the corporation; and for the purposes of jurisdiction it is conclusively presumed that all the stockholders are citizens of the state, which, by its laws, created the corporation.[2] So in this sense, and for this purpose, a corporation is to be considered as a citizen. But it has been repeatedly held that a corporation is not a "citizen" of a state within the meaning of Art. IV, Sec. 2, of the federal constitution which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[3]

State Control of Foreign Corporations.—Recognition of a corporation in a state other than that of its creation rests upon comity, and is within the discretion of the state.[4]

[1] Muller v. Dows (1876), 94 U. S. 444.

[2] See the following cases: Louisville, New Albany, etc., R. Co. v. Louisville Trust Co. (1899), 174 U. S. 552; Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp. (1890), 136 U. S. 356; Steamship Co. v. Lugman (1882), 106 U. S. 118; C. & N. W. R. Co. v. Whitton (1871), 13 Wall. 270; Covington Drawbridge Co. v, Shepherd (1857), 20 How. 227; Marshall v. Baltimore & Ohio R. Co. (1853), 16 How. 314; Louisville, Cin. & Charleston R. Co. v. Letson (1844), 2 How. 497. "It is well settled," said Mr. Justice Gray, in State of Wisconsin v. Pelican Ins. Co. (1887), 127 U. S. 265, at page 287, "that a corporation created by a state, is a citizen of the state, within the meaning of those provisions of the Constitution and Statutes of the United States which define the jurisdiction of the federal courts."

[3] Orient Ins. Co. v. Daggs (1899), 172 U. S. 557, 561; Blake v. McClung (1898), 172 U. S. 239, 259; Norfolk & West. R. Co. v. Pennsylvania (1890), 136 U. S. 114, 118; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania (1888), 125 U. S. 181, 187; Ducat v. Chicago (1870), 10 Wall. 410; Liverpool Ins. Co. v. Massachusetts (1870), 10 Wall. 566; Paul v. Virginia (1868), 8 Wall. 168; Deleham v. So. B. Tel. Co., 126 N. Car. 838; British, etc., Co. v. Craig, 106 Tenn. 632; Cook v. Howland, 74 Vt. 397; Cincinnatti Ass. Co. v. Rosenthal, 55 Ill. 90; Barnes v. People, 168 Ill. 430; Farmers, etc. Ins. Co. v. Hamiah, 47 Ind. 240; Insurance Co. of N A. v. Cone, 87 Pa. 88, 182; Commonwealth v. Gregory (Ky.), 89 S. W. Rep. 168.

[4] Waters-Pierce Oil Co. v. Texas, 177 U. S. 45; Pembina Cons. Silver Min. & Mill. Co. v. Pennsylvania (1888), 125 U. S. 181; Philadelphia Fire Asso. v. New York, 119 U. S. 110; Liverpool Ins. Co. v. Massachusetts (1870), 10 Wall. 566, reiterating the doctrine of Paul v. Virginia (1866), 8 Wall. 168; Bank of Augusta v. Earle (1839), 13 Peters, 519; Hartford Fire Ins. Co. v. Perkins, 125 Fed. Rep. 504; Diamond Glue Co. v. United States Glue Co. (1900), 103 Fed. Rep. 838; Williams v. Gold Hill Mining Co. (1899), 96 Fed. Rep. 454; Manchester Ins. Co. v. Herriott, 91 Fed. Rep. 718; Jones v. Mutual Fidelity Co., 123 Fed. Rep. 532; Union Cent. T. Ins. Co. v. Skipper, 115 Fed. Rep. 72; State v. Lancashire Ins. Co., 66 Ark. 470; Nelson v. Nederland Life Ins. Co., 110 Iowa, 604; Insurance Co. of N. A. v. Brein, 111 Ind. 288; Phenix Ins. Co. v. Welsh, 29 Kan. 674; Hartford, etc., Ins. Co. v. Raymond, 70 Mich. 502; People v. Gay, 107 Mich. 424; Commonwealth v. Roswell, 173 Mass. 120; Northwestern, etc., Ins. Co. v. Lewis, etc., Co., 28 Mont. 491; State v. Standard Oil Co., 61 Neb. 34; Hickman v. State, 62 N. J. Law, 504; Moses v. State, 65 Miss. 60; Seamans v. Christian, etc., Mill. Co., 66 Minn. 207; State v. Stone, 118 Nev. 402; *Ex parte* Cohn, 13 Nev. 426; Life Ins. Co. v. Spratting, 99 Tenn. 328; Floyd v. National Loan, etc., Co., 49 W. Va. 333. "This doctrine," said Mr. Justice Field, in Horn Silver Mining Co. v. New York (1892), 143 U. S. 305, at p. 314, "has

The grant of corporate existence by one state is a grant of special privileges which cannot be enjoyed in another without the assent of the latter, which may impose such conditions as it sees fit.[5]

Speaking of the powers of a corporation in relation to a state in which it is permitted to to do business, the Supreme Court of the United States said in a recent case that none of those powers were original, that the purposes of a corporation and the means of executing those purposes were within the state's control, and that this had even a "broader application" to foreign corporations than to domestic corporations.[6] This doctrine, it is true, is subject to qualification to the extent that corporations of other states engaged in a business authorized by the government of the United States and under its protection cannot be prohibited or obstructed by any state. Thus, in Stockton v. Baltimore & N. Y. R. Co.,[7] it was held that a corporation authorized by congress to construct a bridge across Arthur Kill (Staten Island Sound) might proceed with the work regardless of the assent of the states bordering thereon. "The habits of business," said Mr. Justice Bradley, "have so changed since the decision in the case of Bank of Augusta v. Earle, 13 Pet. 519, and corporate organizations have been found so convenient, especially as avoiding a dissolution at every change of membership, that a large part of the business of the

been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest."

[5] St. Clair v. Cox (1882), 106 U. S. 350, at p. 356; Paul v. Virginia (1868), 8 Wall. 168; Lafayette Ins. Co. v. French (1855), 18 How. 404; The Railroad Tax Cases (1882), 13 Fed. Rep. 722, at p. 747, *per* Mr. Justice Field. This power of a state to prescribe such conditions was applied to a foreign insurance company in Fidelity Mutual Life Asso. v. Mettler (1901), 185 U. S. 308, where it was held that Tex. Rev. Stat. (1895), art. 3071, which directs that life and health insurance companies who shall default in payment of their policies shall pay certain damages and attorneys' fees, did not deny the equal protection of the laws in that the same conditions were not imposed on fire, marine and inland insurance companies.

In Ehrman v. Teutonia Ins. Co. (1880), 1 Fed. Rep. 471, it appeared that by statute in Arkansas (Gantt's Digest, sec. 3561) every foreign insurance company was required, before doing business in Arkansas, to file a stipulation with the auditor of state that service on the auditor should be service on the company. Caldwell, J., holding that, as the company had done those things which imposed upon it the obligation and duty to file the stipulation, it was of no consequence that such stipulation was not in fact filed, said: "Insurance companies incorporated by the laws of one state have no absolute right to do business in another state, without the consent, express or implied, of the latter state. This consent may be given on such terms as the state may think fit to impose, and these conditions are binding on the company."

The "equal protection" clause of the Fourteenth Amendment was construed in Blake v. McClung, 172 U. S. 239, 261. There the Hull Coal & Coke Co., a Virginia corporation not doing business in Tennessee, filed an intervening petition, as creditor of a British corporation, which after doing business in Tennessee had gone into the hands of a receiver, and attacked the constitutionality of a statute which gave to citizens of Tennessee a priority in the distribution of the assets over other creditors. The Supreme Court of the United States affirmed the judgment of the Supreme Court of Tennessee, holding the statute constitutional, Harlan, J., making the decision turn on the construction of the words, "within its jurisdiction." The court said: "We adjudge that the statute, so far as it subordin e claims of private business corporations not within the jurisdiction of the state of Tennessee (although such private corporations may be creditors of a corporation doing business in the state under the authority of that statute), to the claims against the latter corporation of creditors residing in Tennessee, is not a denial of the 'equal protection of the laws' secured by the Fourteenth Amendment to persons within the jurisdiction of the state, however unjust such a regulation may be deemed."

In State of Indiana v. Pullman Palace Car Co. (1883), 16 Fed. Rep. 193, while holding unconstitutional a tax attempted to be imposed by the state on foreign sleeping car companies, Graham, J., acknowledged that "a state may exclude from its jurisdiction corporations of other states not engaged in interstate commerce."

[6] Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 43. A statutory requirement that a foreign corporation before "carrying on" business in Arizona, shall file copies of its Act of Incorporation, and the certificate of appointment of an agent upon whom notices and processes may be served, though not applicable to an isolated transaction, would be a valid, reasonable requirement as a condition precedent to the right to do business. Empire Milling & Mining Co. v. Tombstone Mill. & Mining Co. (1900), 100 Fed. Rep. 910, per Townsend, D. J. In New York State v. Roberts (1898), 171 U. S. 658, at p. 661, Mr. Justice Shiras said: "It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a state may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient, and that it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportionate to the amount of its capital used within the state." The plaintiff, in error in this case, did not attempt to call in question the above position, but claimed that, as a Michigan corporation (Parke, Davis & Company) it was denied the equal protection of the laws in that it, in common with all other corporations which manufactured their goods wholly in other states, and sent them to be sold in New York, was subject to a tax which was not imposed on corporations, foreign or domestic, which manufactured their goods in New York.

[7] 32 Fed. Rep. 9. Appeal dismissed, 140 U. S. 603.

country has come to be transacted by their instrumentality; while their most objectionable feature, the non-liability of incorporators, has in most instances been abrogated in whole or in part; and to deny their admission from one state to another in ordinary cases, at the present day would go far to neutralize that provision in the Fourth Article of the Constitution which secures to the citizens of one state all the privileges and immunities of citizens in another, and that provision in the Fourteenth Amendment which secures to all persons the equal protection of the laws." So a states statute seeking to regulate the agencies of foreign express companiesis unconstitutional.[8]

This is entirely a different thing, however, from the case of a foreign corporation seeking to do a business which does not belong to the regulating power of congress, as, for example, banking or insurance, which may be subjected to stringent regulations for the security of the public.[9] "The exceptions to the rule," said Mr. Justice White, "embrace only cases where a corporation created by one state rests its right to enter another and to engage in business therein upon the federal nature of its business. As, for instance, where it has derived its being from an act of congress,

[8] Crutcher v. Kentucky (1891), 141 U. S. 47.

[9] After a foreign insurance company has received authority from a state to carry on business for a year within its territory and has paid the state tax, and also the tax demanded by the city within which it fixes its office, an ordinance imposing, during the year, a further tax "on each and every fire, marine, or accident insurance company" located in such city, does not violate the clause of the federal constitution prohibiting the impairment of the obligation of contracts. Home Ins. Co. v. City Council of Augusta (1876), 93 U. S. 116. In Hancock Mutual Life Ins. Co. v. Warren (1901), 181 U. S. 73, the judgment of the Supreme Court of Ohio, sustaining the constitutionality of Ohio Rev. Stat. sec. 3625, was affirmed. That section provided that: "No answer to any interrogatory made by an applicant, * * * shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is wilfully false and was fraudulently made," and material, etc.

Chief Justice Fuller said, *inter alia:* "The section in question applies to all life insurance companies doing business in the state of Ohio, and the state can certainly do with foreign corporations what it may do with corporations of its own creation. * * * It was for the legislature of Ohio to define the public policy of that state in respect to life insurance, and to impose such conditions on the transaction of business by life insurance companies within the state as was deemed best." New York Life Ins. Co. v. Cravens, 178 U. S. 389, and Wall v. Equitable Life Assur. Soc. (1887), 32 Fed. Rep. 273, depended upon the same sections of the Missouri Revised Statutes. These statutes, so far as material, are as follows: "Sec. 5983: No policy of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void, by reason of the non-payment of premiums thereon, but it shall be subject to the following rules of commutation, to-wit:" (Then follows a statement of the mode of computing the amount payable in such case). "Sec. 5985: If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section five thousand nine hundred and eighty-three, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of the premium, anything in the policy to the contrary notwithstanding."

(By 2 Mo. Rev. Stat. of 1899, Sec. 7897, the policy becomes non-forfeitable only after three annual payments have been made, and the rate of interest is changed to four per cent).

New York Life Ins. Co. v. Cravens (1900), 178 U. S. 389 (error to the Supreme Court of Missouri) was an action on a policy of life insurance. The application which was made a part of the policy was signed in Missouri where the applicant resided, and contained the provision that the contract should "be construed according to the laws of the state of New York," the place of said contract being agreed to be the home office of said company in the city of New York. Four premiums were paid, two more became due and were not paid and thereafter the insured died. The company, waiving the failure of the insured to demand a paid-up policy, tendered the amount of such paid-up policy. The widow sued for the face of the policy less the amount of unpaid premium and interest thereon, with interest, to which under the Missouri statute, she was entitled. The Supreme Court of the United States, affirming a judgment for the full amount claimed, said, per Mr. Justice McKenna: "The power of a state over foreign corporations is not less than the power of a state over domestic corporations." The court held that the business of life insurance was not commerce, there being no difference in this respect between life, fire and marine insurance, and that, therefore, the Missouri Statute was not an attempt to regulate interstate commerce.

In Wall v. Equit. Life Assur. Soc., 32 Fed. Rep. 273 (U. S. Circuit Court, W. D. Missouri, 1887), a citizen of Missouri made, in Missouri, an application to the defendant which was forwarded to New York and accepted, and the policy prepared and signed in the latter state, was sent to Missouri and there delivered. By the terms of the policy all premiums were payable in New York, and the sum insured, if it should become payable, was to be paid in New York. Three full annual premiums, in the years 1880, 1881 and 1882, were paid, and by virtue of the Missouri Statute the policy was continued in force till August 30, 1886. The policy provided for its surrender and the issuance of a paid-up policy on certain terms, after default in payment, after three full annual premiums had been paid, and the application, which was signed by the insured and by the beneficiary, waived all claim to any other surrender value "whether re-

and has become a lawful agency for the performance of governmental or *quasi* governmental functions, or where it is necessarily an instrumentality of interstate commerce, or its business constitutes such commerce, and is, therefore, solely within the paramount authority of congress."[10]

And the discretion of a state in its dealings with foreign corporations is abridged neither by the Fourteenth Amendment nor by the Civil Rights Act.[11] Home Ins. Co. v. Morse,[12] did not relax the rule. There it was held that a statute requiring that a fire insurance company organized in another state, before it can do business in Wisconsin, must file an appointment of an attorney in Wisconsin, "containing an agreement that such company will not remove the suit for trial into the United States Circuit Court or federal courts," was unconstitutional and void.[13]

The Power of Congress to regulate commerce among the states is as absolute as its power to regulate commerce with foreign nations,[14] and "is necessarily exclusive

quired by a statute" or not. The insured died Jan. 21, 1884. The plaintiff sought to recover the face of the policy. The defense was that the policy was a New York contract; and that even if it were a Missouri contract, the waiver was binding on the plaintiff. These defenses were ordered to be struck out, the court, Brewer, J., holding the contract to be a Missouri contract. Afterwards the case was submitted to the court without a jury, and judgment rendered for the plaintiff. By writ of error the case was taken to the Supreme Court of the United States, where the judgment was affirmed. Equit. Life Assur. Soc. v. Clements (1891), 140 U. S. 226. Orient Ins. Co. v. Daggs (1899), 172 U. S. 557, came up on error from the Supreme Court of Missouri, and involved the question of contractual liberty. Missouri Rev. Stat. 1889, Sec. 5897, ch. 89, art. 4, fixed the measure of damages in case of total loss by fire of the property insured, at the amount for which the property was insured, less the depreciation in value below such amount, sustained between the time of issuing the policy and the time of the loss. The statute also provided that the company defending a claim for loss should not be permitted to deny that at the time of issuing the policy, the property was worth the full amount insured in the policy, and that no condition of any policy contrary to the above provisions should be legal or valid. The defendant, a Connecticut corporation insisted on its right to limit its liability to actual damages caused by fire. Affirming the judgment of the Supreme Court of Missouri, the Supreme Court of the United States held that a corporation was not a citizen in the sense that it could claim the privileges and immunities secured to citizens by the Fourteenth Amendment. In Fletcher v. New York Life Ins. Co. (1882), 13 Fed. Rep. 526, it was held that the insurance company having accepted the advantages of the license to do business in Missouri could not by the insertion of conditions and clauses in the policy or application withdraw itself from the limitations of the state statutes. The application was taken and the policy delivered in St. Louis. The contract was therefore a Missouri contract. The judgment in this case was subsequently reversed in the Supreme Court of the United States on the ground of misrepresentations in the application. But that the contract was a Missouri contract was taken for granted by the justice writing the opinion. New York Life Ins. Co. v. Fletcher, 117 U. S. 519.

[10] Hooper v. California, 155 U. S. 648, 652, 653. To the same effect is Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181. The exception was recognized in Waters-Pierce Oil Co. v. Texas, 177 U. S. 28; Crutcher v. Kentucky (1891), 141 U. S. 47; McCall v. California (1890), 136 U. S. 104, 112; Philadelphia & Southern Steamship Co. v. Pennsylvania (1887), 122 U. S. 327; Pensacola Tel. Co. v. Western U. Tel. Co. (1877), 96 U. S. 1. A corporation created by act of congress is not a foreign corporation in any state of the Union. It may do business in any state without taking out a license or paying a tax required of foreign corporations. Com. v. Texas & Pac. R. Co., 98 Pa. St. 90. But an insurance company chartered by congress in its capacity as the legislature of the District of Columbia, if it attempts to do business in another state, must comply with the laws of such state regulating foreign insurance companies. Daly v. National Life Ins. Co., 64 Ind. 1.

[11] Manchester Ins. Co. v. Herriott (1899), 91 Fed. Rep. 711, 719.

[12] 20 Wall. (1874) 445, reaffirmed in Barron v. Burnside (1887), 121 U. S. 199, explaining and limiting Doyle v. Insurance Co., *infra*.

[13] In Doyle v. Continental Ins. Co. (1876), 94 U. S. 535, the Continental Ins. Co., a Connecticut corporation doing business in Wisconsin, removed a suit brought on one of its policies in a Wisconsin court, into the federal court. Steps were thereupon taken to procure the revocation of the license authorizing the company to do business in Wisconsin. The Circuit Court of the United States, upon application of the company granted a temporary injunction to restrain such revocation. The defendant demurred, the demurrer was overruled, the injunction was made perpetual and an appeal was taken to the Supreme Court of the United States. The court, by Mr. Justice Hunt, acknowledged the authority of Paul v. Virginia, 8 Wall. 168, and Lafayette Ins. Co. v. French, 18 How. 404, and reasserted the power of a state to impose upon a foreign corporation, as a condition of its doing business within the state, such terms and restrictions as it may think proper, and as are not repugnant to the Constitution of the United States. The ruling was that the grant of the right to do business was a mere license, which could be revoked by the state on failure of the company to comply with the condition imposed. The decree of the circuit court was reversed and the bill dismissed. Justices Bradley, Swayne and Miller, dissented.

[14] Brown v. Houston, 114 U. S. 622, 630. And see, Pennsylvania R. R. Co. v. Hughes, 191 U. S. 477, 487. "The power to regulate commerce among the several states is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by congress to its utmost extent, subject only to such limitations as the constitution im-

whenever the subjects of it are national in character, or admit only of one uniform system, or plan of regulation."[15] And in considering what is an article of commerce the courts will consider a declaration of congress on the subject as a fact of the first importance.[16]

Those who have endeavored to make good the position that insurance is commerce have attempted to find comfort and strength in the lottery cases. But those cases are very clearly distinguishable. As the attorney-general pointed out in argument, the insursurance cases were predicated upon the fact that the transactions there involved were intrastate rather than interstate. Moreover, an important question of policy intervened and perhaps was controlling. The lottery act was passed not to limit or derogate from the police powers of the state, but to make effective state regulations. This idea is strengthened by the language of the opinion:

"We should hesitate long" said Mr. Justice Harlan, "before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. * * * It is a kind of traffic which no one can be entitled to pursue as of right."[17]

The police power of a state may be exercised so as to protect and conserve the welfare of its people. That is to say, it may be exercised in self-defense. To totally exclude articles which belong to commerce, and are actually fit for the purposes for which they are intended, does not fall within the power of the state.[18] But, in aid of the police power of the states, congress under its power to regulate commerce, may exercise what is in effect a general police power and may prohibit the transportation from state to state of articles that are injurious to health or morals.[19]

When examining the decisions relating to the power of congress under the commerce clause of the federal constitution one is struck by the development which the whole subject has undergone, and the ever-widening scope which, under judicial interpretation, sanctioned by popular acceptance and action, has been given to the constitutional provisions. "As the people change," said Judge Cooley, "so does their written constitution also; they see it in new lights and with different eyes." The powers granted to congress "are not confined to the instrumentalities of commerce known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances."[20]

poses upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted congress has a large discretion which is not to be controlled by the court, simply because, in their opinion, such regulations may not be the best or most effective that could be employed." The Lottery Case, 188 U. S. 321, 353, per Mr. Justice Harlan.

[15] Robbins v. Shelby Taxing District, 120 U. S. 487, 492, *per* Mr. Justice Bradley; quoted with approval in Atlantic & Pacific Tel. Co. v. Philadelphia, 190 U. S. 160. And see, *In re* Rahrer, 140 U. S. 545, 555, *per* Fuller, C. J.; Cooley v. Board of Wardens of Philadelphia (1851), 12 How. 299, 319. In The License Cases, 5 How. 599, Mr. Justice Catron pointed out the line dividing the state from the federal power, and showed that the police power of the state is inferior to the commercial power of congress. "The power to determine the articles which may be the subjects of commerce is, in effect, the controlling one." In United States v. E. C. Knight Co. (1894), 156 U. S. 1, at p. 13, Mr. Chief Justice Fuller, speaking for the court, said: "The regulation of commerce applies to the subjects of commerce and not to matters of internal police." Congress does not infringe upon the guaranteed liberty of the citizen by prohibiting him from entering into contracts which in effect regulate and restrain commerce among the states. Addystone Pipe & Steel Co. v. United States, 175 U. S. 211. "Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions if it shall be deemed advisable, and that to whatever ground shall be covered by these transactions, the exercise of said power is excluded. Congress may establish police regulations as well as the states, confining their operations to the subjects over which it is given control by the constitution; but as the general police power can better be exercised under the provisions of the local authority, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the national congress, the regulations which are made by congress do not often exclude the establishment of others by the state covering very many particulars." Cooley's Constitutional Limitations (4th Ed.), 732, (6th Ed.) 722, 723, quoted in Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215.

[16] Schollenberger v. Pennsylvania, 171 U. S. 1, 7. And see United States v. Popper, 98 Fed. Rep. 423.

[17] 188 U. S. 358.

[18] Schollenberger v. Pennsylvania, 171 U. S. 1; Plumley v. Massachusetts, 155 U. S. 461; Brimmer v. Rebman, 138 U. S. 78; Minnesota v. Barber, 136 U. S. 313.

[19] The Lottery Case (Champion v. Ames), 188 U. S. 321; U. S. v. Popper, 98 Fed. Rep. 423.

[20] Mr. Chief Justice Waite in Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, at p. 9. See to the

"*Commerce* undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches."[21] "Commerce," said Mr. Justice Field, "is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states."[22] The term was intended by the framers of the constitution to include commerce carried on by corporations as well as traffic between individuals.[23]

But in the trade-mark cases, Mr. Justice Miller, who wrote the opinion of the court, points out that "every species of property which is the subject of commerce, or which is used or even essential in commerce, is not brought by this clause [the commerce clause of the constitution] within the control of congress."[24] The courts in deciding cases involving the question whether a contract of insurance of any kind constitutes interstate commerce, have "proceeded upon a broad analysis of the nature of interstate commerce and of the relation which insurance contracts generally bear thereto. * * * The real distinction upon which the general rule and its distinctions are based, * * * consists in the difference between interstate commerce or an instrumentality thereof on the one side, and the mere incidents which may attend the carrying on of such commerce on the other."[25]

Resume.—It is clear then that the cases decide that,

(1) The state has full discretion to deal with foreign corporations doing business in its territory as it deals with corporations of its own creation, provided that it imposes no conditions repugnant to the Constitution of the United States.

The power of congress is exclusive only when the subject is national in its character or admits of only one uniform system or plan of regulation.

(2) The state can refuse to permit the carrying on of business within its borders by any insurance company which refuses to conform to any conditions which it may see fit to impose.

(3) The contract of insurance is governed by the law of the state in which the insured resides.[26]

same effect the language of Seymour D. Thompson in 37 Am. Law Review, 305.

[21] *Per* Marshall, C. J., in Gibbons v. Ogden (1824), 9 Wheat. 1, at pp. 189, 190.

[22] Welton v. State (1873), 91 U. S. 275. See also Gloucester Ferry Co. v. Pennsylvania (1885), 114 U. S. 196, 203, 204; County of White v. Kimball, 102 U. S. 691; McNaughton Co. v. McGool, 20 Mont. 124.

[23] Paul v. Virginia (1868), 8 Wall. 168.

[24] 100 U. S. (1879), 82, 95.

[25] Mr. Justice White, delivering the opinion in Hooper v. California, 155 Cal. 648, at pp. 653, 655. In Hooper v. California, 155 U. S. 648, a California statute which made it a misdemeanor for a person in that state to procure insurance for a resident in the state from an insurance company not incorporated under its laws, and which company had not filed the bond required by the laws of the state, was not a regulation of commerce. The court reiterated the doctrine that the business of insurance is not commerce, and that a contract of insurance is not, in the constitutional sense of the words, an instrumentality of commerce, and applied it to a marine policy. "That the business of insurance does not generically appertain to such commerce has been settled since the case of Paul v. Virginia, 8 Wall. 168." *Per* Mr. Justice White, who delivered the opinion. Followed in State v. Insurance Co. of North America (Neb.), 106 N.W. Rep. 767. To say that insurance is common or an article of commerce is to give to the word "commerce" a strained construction. Queen Ins. Co. v. State, 86 Tex. 250, 22 L. R. A. 483. Insurance is a simple contract of indemnity against loss, not commerce. State v. Phipps, 50 Kan. 609, 18 L. R. A. 657; List v. Commonwealth, 118 Pa. 322. The decision in Hooper v. California, 115 U. S. 648, that a contract of marine insurance is a mere incident and not an instrumentality of commerce, was recognized and followed in Nutting v. Massachusetts, 183 U. S. 353. The same principle was recognized expressly in Allgeyer v. Louisiana, 165 U. S. 578, which, however, is distinguishable from the above cases in that it decided that a state statute punishing the owner of property for obtaining insurance thereon in another state was unconstitutional. So it has been held that a conspiracy to fix rates of insurance is not an offense under statutes regulating the prices of merchandise. Ætna Ins. Co. v. Commonwealth, 106 Ky. 879. In Philadelphia Fire Ass. v. New York (1886), 119 U. S. 110, the association, a Pennsylvania corporation which had for many years done business in New York under a license from year to year, refused in 1882 to pay the license fee demanded by the superintendent of insurance under a new law applicable to all foreign companies. The corporation claimed the protection of the Fourteenth Amendment. The Supreme Court of the United States held that corporation was not rightly "within the jurisdiction" of New York, until the state, having received the license fee for the future, should assent to its entrance. The court, Blatchford, J., writing the opinion, impliedly held the business of insurance not to be commerce, for it expressly excepted from the operation of the opinion transactions of commerce between the states. See 119 U. S. 120.

[26] It is to be borne in mind that New York Life Ins. Co. v. Cravens, 178 U. S. 389; Orient Ins·

(4) Insurance is not commerce;[27] and federal regulation thereof is undesirable, inexpedient and impracticable.

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Co. v. Dagg, 172 U. S. 557; Equitable Life Assurance Soc. v. Clements, 140 U. S. 226 (affirming Wall v. Equitable Life Ass. Soc., 32 Fed. Rep. 273); Fletcher v. New York Life Ins. Co., 13 Fed. Rep. 526, and cases of that class decide not only that insurance is not commerce, but that the contract is to be governed by the law of the foreign state. The contract, it was explained, was not a contract involving barter and traffic of commodities, but an ordinary contract of insurance and therefore not commerce but a "mere incident." The vital ruling was that notwithstanding a stipulation that the contract should be governed by the law of the domicile of the insurance company, the contract must be governed by the law of the state of residence of the insured.

[27] Contracts of insurance "are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states." *Per* Field, J., in Paul v. Virginia, 8 Wall. 168, at p. 183.

MUNICIPAL CORPORATIONS—VALIDITY OF SPECIAL ASSESSMENTS FOR STREET SPRINKLING.

STEVENS v. CITY OF PORT HURON.

Supreme Court of Michigan, Oct. 4, 1907.

A statute authorizing a municipal corporation to assess the cost of street sprinkling on abutting land in proportion to frontage, without reference to the question of benefits to be derived, is invalid.

HOOKER, J.: An ordinance of the city of Port Huron provided for the assessment of the cost of sprinkling streets upon the premises abutting the street in proportion to street frontage, irrespective of the use made of the premises, and whether they are vacant lots or lands having buildings upon them. A bill was filed on behalf of Fannie F. Mitchell, Jennie J. Willson, and Herman W. Stevens, owners of premises in severalty, to set aside an assessment for such purpose. A demurrer to the bill was overruled as to Mitchell and Willson; the assessment being held void as to them because their vacant property was assessed at the same rate per front foot as were residence properties. It was sustained as to Stevens, because the bill failed to show which of his property was vacant; it alleging that of a large number of separate lots only two had dwellings upon them. Stevens and the city have appealed.

Counsel appear to agree that the meritorious question is whether it is lawful to base an assessment for street sprinkling, upon the foot-front rule. The important question in this case is whether a statute authorizing a municipal corporation to pass an ordinance requiring the cost of street sprinkling to be assessed upon the abutting land in proportion to frontage is valid. The cases where this question has been considered are few and discordant. The differences seem to rest on a disagreement among the judges as to whether it can truly be said that the sprinkling of a street can have any substantial or permanent effect upon the value of the premises; some holding that it does to some extent protect the property from injury, and makes the locality a more comfortable, and therefore desirable, one to live in, thereby enhancing rental value, and that consequently enhancement by paving and that from street sprinkling differ only in degree. Other judges say that this is a similarity more fanciful than real, that it rests on a refinement of logic rather than a substantial and practical benefit, and that such a rule, once established, will furnish a precedent for the imposition of other burdens of like character, such as keeping streets and sidewalks free from ice, mud, water, snow, dust, etc., for the convenience of the traveling public, on no better ground than that a well-kept street is more desirable for residence than one which is not.

Of the cases called to our attention, the earliest is State v. Reis, 38 Minn. 371, 38 N. W. Rep. 97. The case turns upon the question indicated; a somewhat extended argument being made to show that, although the element of permanence is lacking, there is no difference in principle between sprinkling and paving, inasmuch as it cannot be claimed that the latter is eternal, or, as stated in the opinion: "But, if permanence or durability is to be the test, how long must the beneficial results last in order to constitute an improvement? It certainly will not be claimed that the work must be eternal in duration or imperishable in character. We are unable to see any difference in principle between the work of street sprinkling, the results of which, unless repeated, last but a day, and the construction of a block pavement or wooden sidewalk, which wears out or decays and has to be rebuilt every few years. When a pavement or sidewalk has worn out, the future value of the property is not enhanced by it, any more than it is by street sprinkling when that ceases. Neither do we see that it makes any difference whether the substance applied to the surface of the street is wood, which has to be renewed every few years, or water, which has to be applied daily. Each benefits the adjacent property as long as it lasts, and no longer. It is not the agency used, or its comparative durability, but the result accomplished, which must determine whether a work is an improvement in the sense in which that word is here used." This

case was followed by Reinken v. Fuehring, 130 Ind. 382, 30 N. E. Rep. 414, 15 L. R. A. 624, 30 Am. St. Rep. 247. This case related to street sweeping, the cost of which was made the subject of local assessment. In its last analysis this case appears, like the other, to rest upon the principle that the person assessed is benefited in the increased value of his property, either rental or permanent, over and above the benefits received by the public, in a sum equal to the amount he is required to pay. It is upon this theory alone that they (local assessments) can be sustained. This case cites Carthage v. Frederick, 122 N. Y. 275, 25 N. E. Rep. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490, decided in 1890, where an ordinance imposing a penalty for not cleaning snow and ice from a sidewalk was sustained. It appears to approve the suggestion that the imposition of such a burden on the landowner is defensible under the police power of the state, as "requiring a duty to be performed highly salutary and advantageous to the citizens of a populous and closely-built city, and which is imposed upon them because they are so situated that they can most promptly and conveniently perform it"—a rather astounding and startling reason for imposing a public burden on a citizen. The New York case is not left to rest upon this suggestion, however; for it closes with the significant language: "We are unable to yield to this reasoning, because it overlooks, not only public safety and general convenience, but also the peculiar interest that every owner or occupant of real property has in a clean sidewalk in front of his own premises. Whatever adds to the usefulness of a sidewalk adds both to the rental and permanent value of the adjacent lot."

The Indiana case was followed by the case of Sears v. Boston, 173 Mass. 71, 53 N. E. Rep. 138, 43 L. R. A. 834. This was a sprinkling case, and the ordinance was sustained. That case freely admits that the power must rest upon the theory that the assessment is in the nature of a diminution of that which at first is a public burden, by subtracting from it the amount of the special enhancement of private property from the expenditure of public money in part for its benefit. The court recognizes the gravity of the crucial question, for it says: "It is a grave question whether the benefit that comes to abutting property from the watering of the street in front of it is such an improvement to the property that it can be made the subject of an assessment upon it. There must be a real, substantial enhancement of value growing out of a public work to warrant an assessment of special taxes upon particular estates on account of it. The watering of streets produces only transitory effects, and makes no permanent change in the condition of the property." But it continues: "It greatly promotes the health and comfort of the people generally, who use the streets from time to time; but its greatest benefit is to the abutting estates as places for residence or the transaction of business. Indeed, so much more important to the occupants than to the general public have been the benefits from watering streets that until lately the expense of the work in this commonwealth has usually been borne by the abutters, who have procured the watering to be done by private contractors. If a special benefit, accruing from day to day, which very materially increases the rental value of real estate by reason of the proximity of the property to the place where the beneficial work is done, can be treated as an improvement within the reason of the rule which permits special assessments, then such assessments may be made to pay the expense of watering streets." Yet it adds that it is "with some hesitation we hold that there is an improvement of private property, when this work is done by a city regularly from day to day, which may warrant an assessment upon the abutters. It was so held in State v. Reis, 38 Minn. 371, 38 N. W. Rep. 97, and in Reinken v. Fuehring, 130 Ind. 382, 30 N. E. Rep. 414, 15 L. R. A. 624, 30 Am. St. Rep. 247, although the cases generally which uphold such assessments relate to improvements of a permanent character. Many improvements from which real estate receives an incidental advantage are held to justify only general taxation. Hammett v. Philadelphia, 65 Pa. 146, 3 Am. Rep. 615; Washington Avenue, 69 Pa. 352, 8 Am. Rep. 255; Erie v. Russell, 148 Pa. 384, 386, 23 Atl. Rep. 1102; Dyar v. Farmington, 70 Me. 515, 527; State v. Chamberlain, 37 N. J. Law, 388; Dietz v. Neenah, 91 Wis. 422, 427, 64 N. W. Rep. 299, 65 N. W. Rep. 500." The doubt is finally resolved in accordance with the result reached in Minnesota and Indiana, and the case has been followed twice since in Massachusetts. See Phillips Acad. v. Andover, 175 Mass. 118, 55 N. E. Rep. 841, 48 L. R. A. 550; Stark v. Boston, 180 Mass. 293, 62 N. E. Rep. 375.

Upon the other side of this question we find the case of Chicago v. Blair, 149 Ill. 310, 36 N. E. Rep. 829, 24 L. R. A. 412, where it was held that the sprinkling of streets is not a local improvement subject to local assessment. In the opinion we find the following: "The only basis upon which either special assessment or special taxation can be sustained is that from the proposed local improvement the property subjected to the tax or assessment will be enhanced in value to the extent of the burden imposed. * * * If, therefore, from an inspection of the ordinance authorizing the making of the improvement, it appears from the nature of the work proposed that the market value of abutting or adjacent property would not be increased thereby, as a matter of law it would not be a local improvement, within the meaning of the statute, and no declaration of the corporate authorities could make it so. * * * Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. It cannot, we think, in any just sense be said that street sprinkling is an improvement, within the contemplation of article 9 of the cities and villages act. In the nature of

things, the sprinkling is only useful while the work is continued. In a few hours the beneficial effects are gone, and the property is worth no more than before the street was sprinkled. It is insisted, however, that all improvements—the building of sidewalks, the paving of streets, of however lasting material—are evanescent, and in a few years at the most will necessarily require renewing; and that it makes no difference whether it be water put upon the street, or wood or granite; that all alike are but temporary in character. In a sense this is true, but not in a practical sense. It is common experience that well-paved streets and convenient and durable sidewalks, furnishing access to property, do in fact enhance its market value. It is, however, insisted that the sprinkling of the streets during the summer months renders the occupation of adjacent property more enjoyable and comfortable, and that therefore the property is enhanced in value. Doubtless the same result would follow by placing vases at convenient points on the street, to be filled every morning with fresh-cut flowers, or by open-air concerts, in which music should be selected with reference to the taste of the adjacent dwellers. So the employment of an efficient police force, whereby greater safety was felt, would add to the enjoyment and comfort of the persons residing upon the street. The proper watering and clipping of the grass upon lawn and terrace, the removal of garbage from the premises, besides saving expense to the occupant, would add to the enjoyment, and possibly healthfulness, of the locality. These all might be improvements, and increase, while they continued, the desirability of property in their locality. But they are not improvements, either of the property or of the street, within the legislative contemplation when granting power to make local improvements by special assessment. The tendency of municipal government to arrogate to itself power and to encroach upon the rights of the citizen has led to the establishment of the statutory rules of construction, limiting its powers to those expressly granted, or arising by reasonable and necessary implication from the grant. It cannot, we think, be assumed that the legislature intended, by the language employed, to confer power upon the municipality to require work of the class provided for in this ordinance to be done by special assessment, even though it be held to be public work which the municipality is authorized to perform." Pettitt v. Duke, 10 Utah, 311, 37 Pac. Rep. 568, decided in 1894, held that a local assessment could not be imposed for street sprinkling. It is fair to say, however, that this case turned upon a construction of the charter, though the opinion rests the construction of the statute upon the distinction between paving and sprinkling; the former being considered a permanent improvement, while the latter is not. It is difficult to avoid the force of the statement, regarding street sprinkling, that "it is only useful while the work is continued, and in a few hours the beneficial effects are gone, and the property is worth no more than before the streets were sprinkled. It does not enhance the value of the abutting property, and therefore the city cannot demand special contribution by local assessment to bear the cost of the public work."

In Kansas City v. O'Connor, 82 Mo. App. 655, the court held that "that portion of the contract providing for sprinkling the street was *ultra vires*. It was not within the power of the city to lay a special tax against the abutting property of the citizen for the purpose of paying for sprinkling. A special tax against abutting property is based and sustained on the idea that the work for which the tax is laid is an improvement of the property, and sprinkling to keep down the dust, while good for the comfort of the inhabitants, is too intangible to be denominated an improvement of the property." The question again arose in the case of New York Life Insurance v. Prest, 71 Fed. Rep. 815, where Phillips, J., said: "The sole foundation for the exercise of this extraordinary power, so often pressed to the utmost verge of toleration by these municipal governments, rests on the fact or assumption that it operates in the nature of conferring a practical, permanent benefit upon the property itself, independent of any fancy, whim, or caprice of the occupant. The term 'local improvements,' on which the power asserted by this city charter is buttressed, had, at the time of the legislative grant, a well-known and sharply defined meaning in law. As applied to a street, it meant the improvement of a street, as such, within the design of its creation, 'by reason of which the real property abutting or adjacent was especially benefited in its market value.' Cooley, Tax'n, 109, 110; Dill. Mun. Corp. 596, 597. Its exercise is inseparable from the idea and purpose of permanency, and must be of that character which, presumptively, works out an enhancement of the market value of the property assessed. Kankakee Stone & Lime Co. v. City of Kankakee, 128 Ill. 176, 20 N. E. Rep. 670. The Supreme Court of Missouri manifestly entertains the same view. In Neenan v. Smith, 50 Mo. 629, the court says: 'Local taxes for local improvements are merely assessments upon the property benefited by such improvements, and to pay for the benefits which they are supposed to confer. The lots are increased in value, or better adapted to the uses of town lots, by the improvement. Upon no other ground will such partial taxation stand.' This is reasserted by the court in St. Louis v. Allen, 53 Mo. 44, and the same view of the underlying principle runs like a thread of gold through the discussion in State v. Leffingwell, 54 Mo. 458. On page 477 the court sums up the whole doctrine: 'Private property cannot be taken for public use without a just compensation. Special benefits cannot form any part of such benefits, unless they attach to and become a part of the taxed property.' Without such test, Judge Wagner very aptly declares that 'the time will probably come when it will be

deemed advisable to provide statuary and other costly adornments for the park.' Black, P. J., in City of Clinton v. Henry Co., 115 Mo. 569, 22 S. W. Rep. 494, 37 Am. St. Rep. 415, speaking on this subject, said: 'These cases hold that local assessments can be upheld alone on the ground of compensation in benefits to the particular property assessed.' This precise question has been considered and determined by the Supreme Court of Illinois in City of Chicago v. Blair, 149 Ill. 310, 36 N. E. Rep. 829, 24 L. R. A. 412. While it is to be conceded that in some other jurisdictions the contrary view has been expressed, the reason and authority of the Illinois court commands my entire approval. It holds that such an assessment as practiced by the city for street sprinkling was violative of fundamental law, because it is not predicable of an improvement—a betterment—of the adjacent property. It is true the court was there demonstrating that the ordinance in question was not reasonably within the terms of the statute authorizing special assessments. But the legislative branch of the government is as much restrained by the fundamental law of the state in granting power to an integral part of the state, like a city, as the latter is controlled by the legislative grant. Carried to its logical extreme, where is the application of such a power, once conceded, to lead? Under such ordinances streets are sprinkled in front of vacant lots on which are neither house nor any 'living creature.' It could hardly be said, with reason, that running a sprinkling cart now and then in front of such a lot adds to its market value. Nor is there, in such occasional 'laying of the dust,' any semblance of permanency. It is as evanescent as the early and the later dew, and, in my judgment, it is no more within the power of a municipality thus to create liens on the citizens' property than to hire a 'rain-maker' to vex the skies for refreshing showers, and charge the lots adjacent to the raindrops with the cost thereof. As the sprinkling of the public highways of a city, like the cleaning thereof, contributes much to the comfort and enjoyment of the public, its cost should be made a general, and not a special, burden."

If the question before us, is to depend upon the application of the doctrine recognized in most of the cases, viz., that a local assessment can only rest upon a substantial enhancement of values, rather than upon the idea that the public may impose this burden upon the citizen because he is so situated that he can "most promptly and conveniently perform a duty highly salutary and advantageous to the public," a doctrine which is alleged to rest upon the police power of the state, it seems to us that the view taken by the cases last discussed is the correct one. We think it unnecessary to discuss other questions.

The decree is affirmed, with costs, as to complainants Mitchell and Willson, and reversed as to mplainant Steven, who will take the decree ual on the overruling of a demurrer, with costs both courts.

McAlvay, C. J., and Grant and Ostrander, JJ., concurred with Hooker, J.

NOTE.—*Test of Permanency in Sustaining Arbitrary Assessments for Any Public Improvement Against the Abutting Owner.*—The leading case for this week as above reported in full will repay very careful study. It represents to the fullest extent that growing opposition of the courts to any extension of that rule of convenience known as the "front foot rule," now generally applied in levying assessments for local municipal improvements, formulated and promulgated by the Supreme Court of the United States in the leading and celebrated case of French v. Barber Asphalt Paving Co., 181 U. S. 324. In the principal case three separate opinions were written, two in addition to the majority opinion, one by Justice Carpenter concurring with the result reached by Justice Hooker and the majority of the court, but on different grounds, and one by Justice Moore, with whom concurred Justices Blair and Montgomery, dissenting from the position taken by the majority of the court and holding the assessment to be valid under the general rule.

The point in this whole controversy is as to what constitutes a *beneficial improvement*, under the front foot rule which permits a fixed arbitrary assessment against an abutting owner for a local improvement from which his property clearly derives a benefit. Street and sidewalk paving have now by a long line of decisions been held to be such beneficial improvements to abutting property as to justify an arbitary assessment by the legislature or municipal body authorized by statute, without a hearing being granted to any property owner to present the question whether or not his property is in fact benefited by the improvement to the extent of the assessment. It is generally conceded that this rule is one of public expediency; in other words, a rule of convenience without which local municipal improvements would be greatly hindered and delayed if not made quite impossible. It seems that regarded as a pure question of law, divorced from all questions of expediency, the best legal minds are agreed that the enforcement of the "front foot rule" clearly constitutes the taking of private property for public purposes without just compensation. It is this clear recognition of the essential illegality inherent in the "front foot rule" that causes able judges to feel considerable embarrassment in upholding it and so often forces from them exclamations of indignation when the rule is pressed too far, which is but an indication of the suppressed fires of outraged justice which smoulder within them. Thus Justice Phillips (71 Fed. Rep. 815), denominates the application of this arbitrary rule as "this extraordinary power, so often pressed to the utmost verge of toleration by these municipal governments."

Whether this rule, lacking as it does, any substantial foundation in justice, can be long supported by the overwhelming public expediency which seems to demand its existence is a question which we will not consider here, but we are quite fully persuaded from the reluctant manner in which the rule is applied to any sort of public improvement except that of street or sidewalk paving that the courts are seriously hesitating on the question of extending this rule to other local improvements and confining it sharply to that character of public improvement out of which it sprung. To extend the rule in one direction means extending it in all directions. To say that street sprinkling shall be favored would seem logically to mean that removal of garbage, carting of ashes, street and sidewalk sweeping, cultivation of lawns and municipal forestry, all of which are not mere fancies, but have been in one

city or another inaugurated or proposed in pending legislation, shall likewise become a burden on the already heavily oppressed owner of city real estate and mainly for the benefit of that large proportion of city population, rich and poor, who pay but little if any of the city taxes. There must be a halt called somewhere to a rule which is not founded on principle and which works such iniquity; and for that reason we are in most hearty sympathy with the majority opinion of the court in the principal case and with those other courts which have recently shown such manifest reluctance in extending this rule.

We do not think, however, that courts which desire to limit the application of the front foot rule to street and sidewalk paving, should attempt to do so by the argument that it cannotlogically by applied to other improvements which have not the element of permanency. Rather should the situation be regarded as it exists and the reason for not extending this rule be frankly put upon the ground of its essential injustice and its operation strictly confined to the improvements which gave it existence on the only ground by which the rule as even thus restricted can be sustained, that of public convenience and expediency. From this position it can be argued that other improvements, whether permanent or otherwise or whether beneficial to abutting property or otherwise, are not supported by considerations of overwhelming public necessity or convenience and that a municipal corporation desiring to inaugurate such improvements must pay for them out of the municipal treasury or assess them against abutting property only after a public hearing in which the peculiar benefits derived by each piece of property to be assessed above that of the community as a whole have been judicially ascertained. If any other line of argument is taken than that here pointed out, it will be hard to meet the contention of city attorneys and counselors that other improvements proposed, although not of as permanent a character as street and sidewalk paving are, nevertheless beneficial to the property owner, increases the rental value of his property, etc., and that the only distinction, if there is a distinction, between street and sidewalk paving and other minor improvements, such as street sprinkling, carting garbage, hauling ashes, sweeping streets and sidewalks, caring for lawns and trees, etc., etc., is only one of degree. To show, however, the utter fallacy of this argument, if met by the frank confession that the rule itself is essentially evil and sustained only as to certain improvements regarded as overwhelming public necessities, take a case which is not extravagantly conceived but which has its counterpart in every American city of any size. Mr. A, a poor man, buys a twenty-five foot lot for about two hundred and fifty dollars in a cheap neighborhood of the city. He erects a small one story dwelling at the cost of six hundred dollars and mortgages his lot for that purpose, paying the indebtedness off in small payments. The city grows rapidly and soon an expensive vitrified brick street is laid in front of his house at an expense of $4.75 per front foot arbitrarily assessed against his property. Later a sidewalk is laid at a cost of $1.20 per front foot, likewise charged up against his property. Next, the alley is improved at a cost of $2.50 per foot. Then the street sprinklers are put to work and another assessment is made, the amount of which we have not at hand. The street, not yet built up, is prematurely made a thoroughfare for the purpose of giving automobilists and drivers of pleasure conveyances convenient access to the country roads and street sweepers are therefore employed to keep the street looking respectable and Mr. A requested to pay their salary on the front-foot rule. Whether the city has continued its mad gait and made further "improvements" on this street for the public welfare and taxed the abutting property owners therefor, the writer does not know, but this he does know, that Mr. A with but two hundred and fifty dollars actually invested received so many "benefits" from the city, for which he was asked to pay, that they exceeded in value his original investment; and, unable to pay for all the "benefits" which the city forced upon him, he was compelled to sell at a great sacrifice and commence all over again, locating this time in a part of the city which he hopes the city will overlook when dispensing its "benefits."

The most forcible argument to make, therefore, to the application of the front-foot rule of assessment to the many other kinds of public improvements so often proposed by municipal idealists, is that such improvements will not be regarded as such overwhelming public necessities as will justify the application of the extraordinary rule of special assessment, known as the front-foot rule, and that special assessments, if made at all, must be made in the usual way by determining after public hearing the exact benefits received.

A. H. ROBBINS.

JETSAM AND FLOTSAM.

AUTOMOBILES NOT CLASSIBLE WITH DYNAMITE.

The general sentiment as to the highly dangerous, if not actually diabolical, character of automobiles cropped out somewhat comically in the argument of counsel in Jones v. Hoge, in the Supreme Court of Washington (November, 1907), 92 Pac. Rep. 433. It was contended that automobiles are to be classed with locomotives, or dynamite, or high voltage electricity, so that persons owners of automobiles should be held to very extraordinary precautions to avoid injury to others. The Supreme Court of Washington, however, very properly holds otherwise, quoting in support of its position the following passage from Huddy on the Law of Automobiles: "The motor carriage is not to be classed with railroads, which, owing to their peculiar and dangerous character, are subject to legislation imposing many obligations on them which attach to no others. Certainly a motor vehicle is not a machine of danger when controlled by an intelligent, prudent driver. * * * As bearing on this question, it has been stated by authority that out of a total of 3,482 deaths reported to the coroner's office in the city of Chicago for the year 1905 only five were caused by automobiles. For every death caused by an automobile in the city of Chicago there were more than seventy deaths caused by railroad accidents. Twelve people were killed by wagons to every one who met death at the hands of an automobile." It was accordingly held, in harmony with decisions on the subject elsewhere, that where defendant's chauffeur, without authority, took defendant's automobile from the garrage without his knowledge or permission, and while using it on a personal errand of his (the chauffeur's) own ran over plaintiff, the accident occurred while the chauffeur was acting beyond the scope of his master's business, and hence defendant was not liable.—New York Law Journal.

HUMOR OF THE LAW.

One of our respected subscribers, the attorney for a railroad company in a large eastern city sends us the following notice which was served on him by one of the "ambulance chasers" of that city, which we have copied exactly as it was sent to us.

Aug. th 10 1907

to home it may Concearon
this is to certifie that, John ———— has engage me and my Survis to Coleact dameges wick he has Not yet Receaved from the L. S. & M. S. R. Y. he was heart while in their Survis July 19, 1907 and fore my Survis John ———— agreas to Pay me 50 Percent Of What he Receaveds and Party Of the secken part agreas to Pay all Expences in cort, Cort Cost and Attorney fees.

John ————

(Copy of the original contract held by ——.)

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCIDENT INSURANCE—Septic Poisoning.—Where an accident policy insured a dentist against blood poisoning from wounds suffered in professional operations, it was error to charge that the term "wound" included any lesion of the body resulting from external violence whether accompanied by a rupture of the skin or a mucous membrane or not.—Fidelity & Casualty Co. of New York v. Thompson, U. S. C. C. of App., Eighth Circuit, 154 Fed. Rep. 484.

2. ADMIRALTY—Costs—Where there is no statutory provision for the allowance of mileage to a doctor for attendance on the taking of depositions in admiralty such an allowance is not taxable as costs.—Pacific Mail S. S. Co. v. Iverson, U. S. C. C. of App., Ninth Circuit, 154 Fed. Rep. 450.

3. ADVERSE POSSESSION—Bond for Title.—While ordinarily the possession of land by a vendee under a bond for title is not adverse, it becomes so when he has paid the purchase price and fully performed his part of the contract.—Dickson v. Sentell, Ark., 104 S. W. Rep. 148.

4. ADVERSE POSSESSION—Entry and Possession by Mistake.—An encroachment on the land of another under the mistaken belief that the land was part of the land of one who had authorized such encroachment, and not under any claim of right, cannot ripen into title by adverse possession.—Davis v. Owen, Va., 58 S. E. Rep. 581.

5. AGRICULTURE — Agricultural Associations.—A district agricultural association incorporated under St. 1880, p. 62, ch. 69, held a public corporation, so that its property was not subject to execution.—People v. San Joaquin Valley Agricultural Ass'n., Cal., 91 Pac. Rep. 740.

6. AGRICULTURE—Lien on Crops.—Where the relation of landlord and cropper exists, after the payment of rent and all advances, the cropper is entitled to foreclose his special laborer's lien for the balance due.—Garrick v. Jones, Ga., 58 S. E. Rep. 543.

7. ANIMALS—Brands.—Comp. Laws 1897, providing that unrecorded stock brands shall not be evidence of ownership, does not prevent the recognition of a duly recorded brand as evidence of ownership prior to the record of the brand.—Territory v. Meredith, N. M., 91 Pac. Rep. 731.

8. APPEAL AND ERROR—Assignments of Error.—Additional assignments of error filed after an appeal has been perfected by the service of citation by which the court below lost jurisdiction constitutes no part of the record, and will not be considered by the appellate court.—P. P. Mast & Co. v. Superior Drill Co., U. S. C. C. of App., Sixth Circuit; 154 Fed. Rep. 645.

9. APPEAL AND ERROR—Bill of Exceptions.—Where, in a suit against two defendants, the verdict, and judgment are adverse to the defendants, and one moves for new trial, he can except to the judgment overruling his motion and bring the case to the supreme court without making the other defendant a party to the bill of exceptions.—Turner v. Newell, Ga., 58 S. E. Rep. 657.

10. APPEAL AND ERROR—Dismissal.—Where plaintiff in error files a brief, making an abusive and scurrilous attack on the judgment appealed from and an unwarranted reflection on the trial judge, it will be stricken from the files, and the appeal dismissed.—Long-Bell Lumber Co. v. Newell, Okla., 91 Pac. Rep. 697.

11. ASSIGNMENTS — Action by Assignee.—An action cannot be maintained in his own name by one who, having bought the business of another, fills an order sold by the latter to a third person.—Durant Lumber Co. v. Sinclair Lumber Co., Ga., 58 S. E. Rep. 485.

12. ATTORNEY AND CLIENT—Disbarment.—An attorney of the superior court of Washington county, having obtained money from his clients on the pretense that it was needed to bribe a referee in bankruptcy in a proceeding pending in the bankruptcy court, held subject to disbarment by proceedings in the superior court.—State v. Grover, Wash., 91 Pac. Rep. 564.

13. ATTORNEY AND CLIENT—Settlement Between Parties.—A client may settle with the opposite party against the consent of his attorney before or after suit is brought unless the settlement is for the purpose of defrauding the attorney.—*In re* Baxter & Co., U. S. C. C. of App., Second Circuit, 154 Fed. Rep. 22.

14. BAIL—Surrender.—Under Pen. Code 1895, § 935, producing the principal in court is not all that is required; but the attention of the court must be called to her presence and the intent to surrender.—Perkins v. Terrell, Ga., 58 S. E. Rep. 133.

15. BANKRUPTCY—Attorney's Lien.—An order directing a deposit in bankruptcy proceedings against a corporation held effective to protect any liens which the attorney for the petitioning creditors had for his services.—*In re* Baxter, & Co., U. S. C. C. of App., Second Circuit, 154 Fed. Rep. 22.

16. BANKRUPTCY—Chattel Mortgages.—A chattel mortgage given by a small retail merchant on his stock, containing no after-acquired property clause, cannot be enforced against stock on hand when he was adjudicated a bankrupt nearly a year and a half afterward without proof that the goods were the same.—*In re* Doran, U. S. C. C. of App., Sixth Circuit, 154 Fed. Rep. 467.

17. BANKRUPTCY—Competency of Alien as Trustee.—A person is not disqualified from acting as a trustee in bankruptcy because he is an alien if he is competent to perform the duties and resides or has an office in the district and is duly chosen by the creditors.—*In re* Coe, U. S. D. C., S. D. N. Y., 154 Fed. Rep. 162.

18. BANKRUPTCY—Concealment of Assets.—Specifications of objection to a bankrupt's discharge alleging concealment of assets or withholding of books, not charged to have been with a fraudulent intent to conceal the bankrupt's true financial condition, held insufficient. —*In re* Griffin Bros., U. S. D. C., S. D. Ala., 154 Fed. Rep. 537.

19. BANKRUPTCY—Corporations Engaged in Manufacturing.—A corporation held, on the facts, not one engaged in manufacturing so as to render it subject to bankruptcy proceedings under Bankr. Act July 1, 1898, ch. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3223] —*In re* Portland Cement Co., U. S. D. C., E. D. Mich., 156 Fed. Rep. 83.

20. BANKRUPTCY—Discharge.—A borrowing of money does not constitute the "obtaining of property on credit" within the meaning of Bankr. Act, ch. 541, § 14b (3), and the obtaining by bankrupt of a loan from a bank by means of a materially false statement in writing made for the purpose is not ground for the denying him a discharge.—*In re* Pfaffinger, U. S. D. C., W. D. Ky., 154 Fed. Rep. 528.

21. BANKRUPTCY—Fraudulent Transfers.—Conveyance by insolvent to his wife of house furnishings bought on credit, in consideration of the marriage, held fraudulent as to creditors in suit by trustee in bankruptcy.—Hosmer v. Tiffany, 105 N. Y. Supp. 1055.

22. BANKRUPTCY—Funds in Hands of Wife.—A bankrupt who a few days prior to his bankruptcy paid money received for property sold to his wife held properly ordered to pay over the same to his trustee and to be in contempt for failure to obey such order except as to a sum which she was affirmatively shown to have paid out prior to the bankruptcy.—*In re* Eddleman, U. S. D. C., W. D. Ky., 154 Fed. Rep. 160.

23. BANKRUPTCY—Lien of Judgment.—The lien of a judgment obtained more than four months before in petition in bankruptcy is superiorto the adjudication in bankruptcy.—Kaminsky v. Horrigan, Ga., 58 S. E. Rep. 497.

24. BANKRUPTCY — Proceedings Before Referee.—A party having had an opportunity to call and examine witnesses before a referee in bankruptcy should not be permitted to reopen the case and produce further evidence in the absence of a special reason therefor.—*In re* Booss, U. S. D. C., E. D. Pa., 154 Fed. Rep. 494.

25. BANKRUPTCY—Proceedings to Revise in Matters of Law.—Bankr. Act, § 24b, ch. 541, giving circuit courts of appeals authority to superintend and revise in matters of law, was intended to provide a summary method of revising the orders of courts of bankruptcy on questions of law, and does not contemplate any review of facts.—*In re* Graessler & Reichwald, U. S. C. C. of App., Ninth Circuit, 154 Fed. Rep. 478.

26. BANKRUPTCY — Property Held Under Conditional Sale.—A lessor of property to a bankrupt who failed to insist on a forfeiture of the contract to which it was entitled by its terms on default in the payment of rent held not entitled to declare such forfeiture and reclaim the property after bankruptcy, but only to the balance of the payments due to make the bankrupt the owner of the property under the contract.—*In re* Palatable Distilled Water Co., U. S. D. C., E. D. Pa., 154 Fed. Rep. 531.

27. BANKRUPTCY—Summary Proceedings.—A court of bankruptcy may by summary process require those asserting title in property, in its possession, as part of the bankrupt's estate, to present their claims and on notice, may adjudicate the merits thereof.—*In re* Eppstein, U. S. C. C. of App., Eighth Circuit, 156 Fed. Rep. 42.

28. BANKRUPTCY — Voidable Preferences.—Evidence considered, and held to show that certain payments made by a bankrupt within four months prior to his bankruptcy were intended as preferences, and were received under such circumstances as to render them voidable.—Stevens v. Oscar Holway Co., U. S. D. C., D. Me., 156 Fed. Rep. 90.

29. BANKS AND BANKING—Obligation of Payee.—Where plaintiff's drummer without authority cashed checks payable to plaintiff taken from plaintiff's customer, and absconded without accounting for the money, the checks did not transfer to the bank the customer's money for plaintiff's use so as to entitle plaintiffs to recover against the bank as for money received.—Lonier v. State Sav. Bank, Mich., 112 N. W. Rep. 1119.

30. BANKS AND BANKING—Payment of Check by Insolvent Bank.—Where the depositor of an insolvent bank is paid, with knowledge that the bank is insolvent, he is liable for the difference between the amount so received and his share of the assets of the bank.—McGregor v. Battle, Ga., 58 S. E. Rep. 28.

31. BENEFIT SOCIETIES—Action on Benefit Certificate. —The beneficiary of a benefit certificate in the Odd Fellows Benefit Association held not entitled to recover thereon where the member to whom certificate was issued had not paid all the dues she owed the Household of Ruth and the benefit association.—Odd Fellows Ben. Ass'n v. Burton, Ark., 104 S. W. Rep. 168.

32. BILLS AND NOTES—Bona Fide Purchaser.—A maker of a note, who, on receiving notice of the assignment thereof, promises the assignee to pay it, and assures him that it is all right, cannot by any transaction with the payee render it void and uncollectible in the hands of the assignee.—Isaac Eberly Co. v. Gibson, Va., 58 S. E. Rep. 591.

33. BILLS AND NOTES—Corporations.—In an action on notes given by defendant to a company and indorsed to plaintiff, a perfect cause of action is shown without proof of the company's corporate capacity.—Jones v. Evans, Cal., 91 Pac. Rep. 532.

34. BILLS AND NOTES—Indorsement.—A payee in notes secured by mortgage, who transferred them with the mortgage, with indorsement, "By agreement with recourse after all security has been exhausted," held liable to pay only the balance due after the security had been exhausted.—Smith v. Bradley, N. Dak., 112 N. W. Rep. 1062.

35. BILLS AND NOTES—Production of Coupon.—The execution of or signature to an indorsement of a note, in the absence of a specific denial under oath of execution or signature, is to be regarded as in accordance with the facts.—Milwaukee Trust Co. v. Van Valkenburgh, Wis., 112 N. W. Rep. 1083.

36. BREACH OF MARRIAGE PROMISE—Jurisdiction.—In a breach of promise suit, a failure to allege a right of action in Italy, where it was made, was to be performed, and was broken, held not to go to the jurisdiction of the subject-matter, but only to the sufficiency of the declaration.—Massuco v. Tomasi, Vt., 67 Atl. Rep. 551.

37. BRIDGES—Liability of County.—If a public bridge is a part of the public county road and the public authorities use it, the county is liable for an injury resulting from the negligent failure to repair.—Early County v. Fain, Ga., 58 S. E. Rep. 528.

38. CANCELLATION OF INSTRUMENTS — Grounds. — A deed to a farm made by an uncle to his nephew and godson, reserving a life estate in himself, held on the facts shown not so improvident or unconscionable as to warrant its cancellation at suit of the grantor.—McElroy v. Masterson, U. S. C. C. of App., Eighth Circuit, 156 Fed. Rep. 86.

39. CARRIERS—Injury to Freight.—Where it does not appear that the carrier received the goods in bad order, the presumption is that they were in good order, and the burden is on the carrier to show that it was free from negligence.—Ohlen v. Atlanta & W. P. R. Co., Ga., 58 S. E. Rep. 511.

40. CARRIERS—Injury to Freight.—To demand of a first carrier proof that injury to freight addressed to a point beyond its line, where it has been delivered to a connecting carrier, did not occur on its line, does not prohibit a

shipper without such demand from bringing an action for an alleged injury.—St. Louis & S. F. R. Co. v. McGivney, Okla., 91 Pac. Rep. 698.

41. CARRIERS—Liability for Acts of Employees.—Though the conductor of a common carrier is clothed by law with police power, that fact affords no immunity to a carrier for damages resulting from his wrongful discharge of his duty.—Georgia Ry. & Electric Co. v. Baker, Ga., 58 S. E. Rep. 88.

42. CARRIERS—Liability for Lost Baggage.—Where a passenger leaves his trunk over night in the baggage room, the carrier has no higher responsibility than that of a depositary.—Southern Ry. Co. v. Rosenheim & Sons, Ga., 58 S. E Rep. 81.

43. COMMERCE—Safety Appliance Act.—It is a violation of section 2 of the Safety Appliance Act of March 2, 1893 (27 Stat. 531, ch. 196), to move an empty car not equipped with automatic couplers as required by the act from one state into another as part of a train where such car is in general use to carry interstate traffic.—United States v. St. Louis, I. M. & S. R. Co., U. S. D. C., W. D. Tenn., 154 Fed. Rep. 516.

44. CONTEMPT—Nature of Proceedings.—An appeal from an order in a civil proceeding to punish for contempt for violating an order of court, within the jurisdiction of the court granting it, brings up for review only the question whether the order has been violated.—Vilter Mfg. Co. v. Humphrey, Wis., 112 N. W. Rep. 1095.

45. CONTRACTS—What Law Governs.—Where the laws of another state *pro hac vice* apply an answer to a suit based on a contract to be performed in that state should be stricken, unless a meritorious defense, under the laws of that state, is presented.—Missouri State Life Ins. Co. v. Lovelace, Ga., 58 S. E. Rep. 93.

46. CORPORATIONS—Certificates of Incorporation.—A certificate of incorporation held to constitute a legal liability on the part of each subscriber to pay the corporation for the number of shares specified in the certificate.—Rathbone v. Ayer, 105 N. Y. Supp. 1041.

47. CORPORATIONS—Diverse Citizenship.—Where a bill was maintainable in a federal court only because of diverse citizenship, and was unsustainable as to some of the defendants who were not indispensable parties, the court was authorized prior to their appearance by equity rule 47 to dismiss the case as to them.—A. R. Barnes & Co. v. Berry, U. S. C. C., S. D. Ohio, 156 Fed. Rep. 72.

48. CORPORATIONS—Doing Business in Foreign State.—A New Jersey corporation entering into a factorage contract with a corporation in Colorado within the meaning of the constitution and statutes of that state.—Butler Bros. Shoe Co. v. United States Rubber Co., U. S. C. C. of App., Eighth Circuit, 156 Fed. Rep. 1.

49. CORPORATIONS—Failure to Comply with State Law.—An action against a foreign corporation to recover a penalty for doing business in Arkansas without complying with Act May 13, 1907, held a civil action.—Western Union Telegraph Co. v. Andrews, U. S. C. C., E. D. Ark., 154 Fed. Rep. 95.

50. CORPORATIONS—Powers of Officers.—On transfer by indorsement of commercial paper held by the corporation, the indorsement being in the name of the president, his authority is to be implied, and the act is binding on the corporation.—Milwaukee Trust Co. v. Van Valkenburgh, Wis., 112 N. W. Rep. 1088.

51. CORPORATIONS—Suit by Stockholder.—To a suit in equity by stockholder against the corporation other corporations the stock of which was held by defendant but whose internal management was not involved held not necessary parties.—Sabre v. United Traction & Electric Co., U. S. C. C., D. R. I., 156 Fed. Rep. 79.

52. COURTS—Corrections of Record.—A person interested in the proceedings of a court of record may have the journal corrected as of the date the record should have been made on notice.—Board of Comrs. of Day County v. State of Kansas, Okla., 91 Pac. Rep. 699.

53. COURTS—Evidence Unlawfully Extorted.—When by an unlawful search and seizure under an illegal arrest a person is compelled by an officer to furnish incriminating evidence, such evidence is inadmissible against him in a criminal prosecution.—Hammock v. State, Ga., 58 S. E. Rep. 66.

54 COURTS—Habeas Corpus.—Though the chapter of the statutes on the subject of *habeas corpus* is not applicable to original proceedings in the supreme court, yet the statute is usually adopted by that court for guidance on questions of practice.—*Ex parte* Moyer, Colo., 91 Pac. Rep. 739.

55. COURTS—Jurisdiction of Supreme Court.—The supreme court has jurisdiction of an appeal by the city of St. Louis from a judgment for defendant in an action to recover a fine for the violation of an ordinance of that city on the ground that the ordinance was unconstitutional.—City of St. Louis v. De Lassus, Mo., 104 S. W. Rep. 12.

56. COVENANTS—Notice to Maintain or Defend Title.—Notice alone by a covenantee to covenantor of a suit brought against covenantee is insufficient to make such suit conclusive on covenantor, but covenantor must also be requested to appear and defend.—Morgan v. Haley, Va., 58 S. E. Rep. 564.

57. CRIMINAL EVIDENCE—Credibility.—Though a witness for the state has been impeached, and several witnesses charged this one witness with being the actual perpetrator of the crime, yet a verdict based on his testimony will not be disturbed.—Cothran v. State, Ga., 58 S. E. Rep. 544.

58. CRIMINAL LAW—Presumption of Innocence.—The presumption of innocence held to overcome a presumption that defendant continued a member of a fraudulent conspiracy after the conspirators adopted a criminal method of prosecuting their scheme arising from the fact that defendant had formerly been a member of the conspiracy.—Dalton v. United States, U. S. C. C. of App., Seventh Circuit, 154 Fed. Rep. 461.

59. CRIMINAL LAW—Unwarranted Statements by Counsel.—It is a general rule with rare exceptions arising from extreme cases that prejudice created by unwarranted statements of counsel in the presence of the jury is sufficiently cured by an admonition by the court to the jury to wholly disregard such statements.—Carroll v. United States, U. S. C. C. of App., Ninth Circuit, 154 Fed. Rep. 425.

60. CRIMINAL TRIAL—Conviction.—Where a new trial is granted after conviction of manslaughter on an information for murder, defendant may be again placed on trial for murder, unless he pleads former conviction.—People v. Solani, Cal., 91 Pac. Rep. 654.

61. CRIMINAL LAW—Disturbing Public Worship.—In an action for disturbing public worship, the fact that one of the witnesses was struck by a plank is sufficient to show that weapons were actually used so as to make the offense beyond the jurisdiction of a magistrate.—State v. Jones, S. Car., 58 S. E. Rep. 8.

62. CRIMINAL LAW—Former Jeopardy.—In a prosecution for felony, where the court, defendant being in jail, ordered a mistrial for inability of the jury to agree, on a subsequent trial it was reversible error to strike a plea setting up such unauthorized mistrial and former jeopardy.—Bagwell v. State, Ga., 58 S. E. Rep. 650.

63. CRIMINAL TRIAL—Furnishing Liquor to Minor.—Where a liquor dealer in one county receives by mail an order for intoxicating liquors from a minor in another county and ships the liquor by express to the latter county, he may be indicted in either of the counties named for a violation of Pen. Code 1895, § 444.—Newsome v. State, Ga., 58 S. E. Rep. 71.

64. CRIMINAL TRIAL—Misconduct of Attorney.—Misconduct of district attorney in asking a question, so as to get inadmissible facts before the jury, held not prejudicial; the court having severely reprimanded the district attorney and instructed the jury not to consider the matter.—People v. Bradbury, Cal., 91 Pac. Rep. 497.

65. CUSTOMS AND USAGES—Interpretation of Contract.—Where a New York fire policy insuring property in Vir-

ginia expired at noon on a specified day, parol evidence was admissible to show the custom of the place where the property was situated, on the issue whether the parties intended the term "noon" should be governed by solar or standard time.—Globe & Rutger's Fire Insurance Co. of New York v. David Moffatt Co., U. S. C. C. of App., Second Circuit, 154 Fed. Rep. 13.

66. CUSTOMS DUTIES—Sugar Tests.—The rule of "*de minimis non curat lex*" does not require that as to sugar drainings testing 56.025 degrees, the fraction of a degree should be disregarded so as to make the drainings classible as testing "not above fifty-six degrees," rather than "fifty-six degrees and above."—United States v. Lueder, U. S. C. C. of App., Second Circuit, 154 Fed. Rep. 1.

67. DAMAGES—Attempt to Arrest Loss.—Where an injured person uses reasonable care to arrest the loss by a wrong done him, if by such attempt the loss is increased, it does not relieve the wrongdoer from a full recovery of the damages claimed.—Mogollon Gold & Copper Co. v. Stout, N. M., 91 Pac. Rep. 724.

68. DEATH—Statute Giving Right of Action.—The rule established by the weight of authority is that if a statute of the forum creates a right of action for damages resulting from death caused by wrongful act, neglect, or default, a foreign statute creating such right will be enforced if the two statutes be not so dissimilar as to establish substantially different policies.—Keep v. National Tube Co., U. S. C. C., D. N. J., 154 Fed. Rep. 121.

69. DEDICATION—Diversion.—It is not in the power of the legislature, unless in the exercise of the power of eminent domain, to authorize property dedicated to the public for a specific purpose to be used for a purpose inconsistent with that for which it was dedicated.—Louisville & N. R. Co. v. City of Cincinnati, Ohio, 81 N. E. Rep. 983.

70. DESCENT AND DISTRIBUTION—Action by Heirs.—Under Kirby's Dig. § 13, the heirs of an intestate leaving no liabilities cannot sue on a note which was a part of the intestate's estate until all of them are of age.—Chisholm v. Crye, Ark., 104 S. W. Rep. 167.

71. DIVORCE — Enjoining Husband From Disposing of Property.—An injunction to restrain a husband from incumbering or disposing of his property pending divorce should not be granted where he is neither attempting nor threatening so to do.—Melvin v. Melvin, Ga., 58 S. E. Rep. 474.

72. EASEMENTS—Right to Light and Air.— Where a tenant has an easement of the right to light and air from the adjoining land of the landlord, one who subsequently rents the adjoining land is liable to his neighbor tenant in damages on interference with such implied easement.—Darnell v. Columbus Show Case Co., Ga., 58 S. E. Rep. 681.

73. EQUITY—Practice.—A court of equity may in a proper case reserve consideration of any questions of law arising on a bill until final hearing, notwithstanding the filing of a demurrer.—Snyder v. De Forest Wireless Telegraph Co., U. S. C. C., D. Me., 154 Fed. Rep. 142.

74. EQUITY—Right of Action.—A complainant is not debarred from all relief in equity against a voidable transaction by which others besides himself are affected, and in which they have acquiesced, because he does not seek to have such transaction avoided as to them, but asks only equitable compensation for the injury resulting to himself.—Sabre v. United Traction & Electric Co., U. S. C. C., D. R. I., 156 Fed. Rep. 79.

75. ESTOPPEL—Ignorance of Facts.—An owner of land not having objected to an encroachment thereon, under the mistaken belief that the same was not on his land, held not thereby estopped from asserting his title.—Davis v. Owen, Va., 58 S. E. Rep. 581.

76. EVIDENCE—Declarations as to Pain.—Declarations of plaintiff as to his physical suffering, which were no part of the *res gestæ*, where plaintiff fully described the character and extent of his injuries, were properly excluded.—Goodwyn v. Central of Georgia Ry. Co., Ga., 58 S. E. Rep. 688.

77. EVIDENCE—Judicial Notice.—Courts of record will take judicial notice of the county seat, and, if the seat of public business is the county seat, *de facto*, the courts will take notice thereof.—Board of Com'rs of Day County v. State of Kansas, Okla., 91 Pac. Rep. 699.

78. EVIDENCE—Letters.— In an action for attorney's services, letters written by defendant to plaintiff showing that defendant was engaged in leasing buildings for immoral purposes held admissible to show that plaintiff had rendered services consisting of advice and consultation in regard thereto.—Stern v. Daniel, Wash., 91 Pac. Rep. 552.

79. EVIDENCE—Matters of Common Knowledge.—The court will take judicial notice that a great majority of medical writers and practitioners advocate vaccination as an efficient means of preventing smallpox.—Auten v. Board of Directors of School Dist. of Little Rock, Ark., 104 S. W. Rep. 180.

80. EVIDENCE—Mortgaged Chattels. — A mortgage in which the property is described as "all my crops now up and growing on 240 acres of land, in J. district, county and state aforesaid," may be explained by parol, so as to identify such property.—Read Phosphate Co. v. S. Weichselbaum Co., Ga., 58 S. E. Rep. 122.

81. EXECUTORS AND ADMINISTRATORS—Allowance of Claims.—In a proceeding by a son in-law to establish a claim for board and care against his deceased father-in-law's estate, it is proper to consider, in determining if decedent became a member of claimant's family, whether he discharged any family duty.—Sarchfield v. Hayes, Iowa, 112 N. W. Rep. 1100.

82. EXECUTORS AND ADMINISTRATORS—Bills and Notes.—A wife holding certain notes against her husband having bequeathed the interest thereon to him for life, her executor was entitled to possession and control of the notes, but not to collect them during that period.—*In re* Church's Estate, Vt., 67 Atl. Rep. 549.

83. EXECUTORS AND ADMINISTRATORS—Judgment Authorizing Sale of Land.—Though the purchasers at an administrator's sale of land and also the former administrator, who had been discharged, were made parties to a motion to set aside the judgment of sale, this would not obviate the effect of the discharge or the absence of the administrator as such.—Whitley Grocery Co. v. Jones, Ga., 58 S. E. Rep 623.

84. FEDERAL COURTS—State as Party to Suit.—A suit may be maintained against a state officer in the federal courts where he is claiming under an unconstitutional state statute and holds possession or is about to take possession or commit a trespass on property belonging to or in plaintiff's possession.—Western Union Telegraph Co. v. Andrews, U. S. C. C., E. D. Ark., 154 Fed. Rep. 95.

85. FEDERAL COURTS—Where State is Real Party in Interest.—The state is the real party in interest when the relief sought inures to the state alone, and the effect of the action will be to deprive the state of funds or property in its possession.—Western Union Telegraph Co. v. Andrews, U. S. C. C., E. D. Ark., 154 Fed. Rep. 95.

86. FIRE INSURANCE—Construction.—A policy insuring certain bark on plaintiff's tannary premises held not to include a bark pile not located in a space marked "8" on a plan of plaintiff's premises, referred to as a part of the description in the policy.—Globe & Rutgers Fire Ins. Co. of New York v. David Moffat Co., U. S. C. C. of App., Second Circuit, 154 Fed. Rep. 13.

87. FIRE INSURANCE—Property Insured.—An insurance policy describing the property as "a two-story frame building and its addition adjoining and communicating," will not include a servant's house 150 feet distant from the two-story frame building.—North British & Mercantile Ins. Co. v. Tye, Ga., 58 S. E. Rep. 110.

88. FRAUDS, STATUTE OF—Letters to Third Persons.—Letters addressed to a third person stating and affirming a contract may be used against the writer as a memorandum of the contract, and are sufficient evidence to warrant the court in giving effect to it.—Nicholson v. Dover N. Car., 58 S. E. Rep. 444.

89. FRAUDS, STATUTE OF — Original Undertaking. — Where defendant agreed to pay for property while plaintiff's house was occupied by defendant's servant if destroyed by fire, the contract was an original undertaking, not within the statute of frauds —Chapman v. Conwell, Ga., 58 S. E. Rep. 137.

90. FRAUDS, STATUTE OF—Sale of Personalty.—Where personalty verbally sold is in the possession of the vendee, to satisfy the statute of frauds there must be some affirmative act on the part of the purchaser manifesting an intent to accept the property.—J. H. Silkman Lumber Co. v. Hunholz, Wis., 112 N. W. Rep. 1081.

91. FRAUDULENT CONVEYANCES—Validity as Between Parties to Transaction.—Where parties confederate to defraud creditors of one of them, and the debtor executes a deed, he will not be permitted to cancel such deed by showing that it was fraudulent.—Sewell v. Norris, Ga., 58 S. E. Rep. 637.

92. HABEAS CORPUS—Custody of Prisoner Pending Hearing.—Where, on return of a writ of *habeas corpus*, the governor of the state declares that he holds petitioner as a military necessity, application for bail pending final hearing will be denied.—*Ex parte* Moyer, Colo., 91 Pac. Rep. 738.

93. HABEAS CORPUS—Judgment.—A judgment of conviction pronounced on a plea of "not guilty," without the intervention of a jury, is void, and *habeas corpus* proceedings will lie to discharge person.—*In re* McQuown, Okla., 91 Pac. Rep. 689.

94. HOMESTEAD—Land Held as Tenants by Entireties. —A homestead may be acquired in land held by husband and wife jointly or as tenants by entireties.—Gannon v. Moore, Ark., 104 S. W. Rep. 139.

95. HOMICIDE—Instructions. — It is error to charge, where the defendant had cut the prosecutor, that he would be guilty of the offense of stabbing if the cutting was done under such circumstances as would have been voluntary manslaughter if death had ensued.—Burris v. State, Ga., 58 S. E. Rep. 545.

96. HOMICIDE — Soldier Charged With Crime Under State Law.—A soldier who as guard in shooting at an escaping prisoner accidentally struck and killed a third person held to have been acting in good faith in the supposed discharge of his duty, and not to be subject to prosecution for manslaughter by the state.—United States v. Lipsett, U. S. D. C., W. D. Mich., 156 Fed. Rep. 65.

97. INFANTS—Service on Next Friend.—Where a minor sues by next friend and prevails, service of the bill of exceptions shoud be made on such next friend.—Vickers v. Hawkins, Ga., 58 S. E. Rep. 44.

98. INJUNCTION—Contract With Trade Unions.—Members of a typothetæ held entitled to an injunction against the officers of the International Printing Pressmen & Assistants' Union restraining them from demanding a modification of an existing working contract, from inciting strikes, arranging for a referendum vote of employees on the subject of instituting strikes, and from paying strike benefits.—A. R. Barnes & Co. v. Berry, U. S. C. C., S. D. Ohio, 156 Fed. Rep. 72.

99. INJUNCTION—Inadequate Remedy at Law.—A surety may be permitted to make its defense to a recovery on a county treasurer's bond in a court of equity, notwithstanding it might be able to interpose the same in an action at law.—United States Fidelity & Guaranty Co. v. Jordan, Va., 58 S. E. Rep. 567.

100. INTERSTATE COMMERCE—Corporations in Employ of the United States.—Every corporation which is in the employ of the United States has the right to exercise the necessary corporate powers and to transact the requisite business to discharge the duties of that employment in every state in the Union without let or hindrance.—Butler Bros. Shoe Co. v. United States Rubber Co., U. S. C. C. of App., Eighth Circuit, 156 Fed. Rep. 1.

101. INTOXICATING LIQUORS — Furnishing Liquor to Minor.—A liquor dealer who ships whisky to a customer not personally known to him is subject to conviction if the customer proves to be a minor.—Newsome v. State, Ga., 58 S. E. Rep. 71.

102. INTOXICATING LIQUORS—Sales.—A saloon keeper has no vested rights in a liquor traffic which cannot be controlled or prohibited by the police power of the state. —*In re* Clement, 105 N. Y. Supp. 1054.

103. JUDGES—Powers in Vacation.—A circuit court can exercise at chambers any power not requiring the trial of an action.—*In re* Potter, Wis., 112 N. W. Rep. 1087.

104. JUDGMENT—Persons Concluded.—A decree in favor of the defendant, in a suit for infringement of a patent brought after the defendant had been succeeded in business by a corporation, is not a bar to a second suit against the corporation which continued the alleged infringement but was not made a party to the first suit. —Calculagraph Co. v. Automatic Time Stamp Co., U. S. C. C., S. D. N. Y., 154 Fed. Rep. 166.

105. JUDGMENT—Setting Aside.—Until the end of the term judgments may be set aside or modified at the judge's discretion; but to set aside a judgment based on a verdict, except for defects on the face of the record, the verdict must also be set aside.—Georgia Ry. & Electric Co. v. Hamer, Ga., 58 S. E. Rep. 54.

106. LANDLORD AND TENANT—Lease.—A landlord of a tenant vacating the premises before the expiration of the term held entitled to recover the difference between the amount agreed on the lease and rent received under a re-rental.—Auer v. Hoffman, Wis., 110 N. W. Rep. 1090.

107. LANDLORD AND TENANT—Title to Crops.—Where the relation of landlord and cropper exists, the cropper is without title to any part of the crop until the rent and advances are paid.—Garrick v. Jones, Ga., 58 S. E. Rep. 543.

108. LARCENY—Cattle Theft.—On a trial for larceny of a calf bearing a certain brand which was not recorded until after the theft, evidence held admissible that the owner began to use the brand 10 years before.—Territory v. Meredith, N. M., 91 Pac. Rep. 731.

109. LIFE INSURANCE—Action on Benefit Certificate.— In insurer held not estopped from denying the truth of the answer that insured had not been insane, on the ground that its agents knew that such answer was false. —Mudge v. Supreme Court, I. O. F., Mich., 112 N. W. Rep. 1130.

110 LIFE INSURANCE—Burden of Proving Suicide.—The burden of proving the defense of suicide in an action on a policy of life insurance is on the defendant.—Hildebrand v. United Artisans, Oreg., 91 Pac. Rep. 542.

111. LIFE INSURANCE—Rights of Insured.—Citizens of this state will not be denied any rights under a policy of life insurance allowed citizens of the place of contract.— Missouri State Life Ins. Co. v. Lovelace, Ga., 58 S. E. Rep. 98.

112. LIMITATION OF ACTIONS—Accrual of Cause of Action.—Sale of mortgaged premises and application of proceeds on mortgage debt, as allowed by mortgage on default in payment of interest, held not to render balance due, as respects the running of the statute against an action therefor.—Hall v. Jameson, Cal., 91 Pac. Rep. 518.

113. LIMITATION OF ACTIONS—Computation of Period.— The statute of limitations would not run on a note belonging to the estate of the intestate, who left no liabilities, while there was no administration of an estate and the heirs were not all of age.—Chisholm v. Crye, Ark., 104 S. W. Rep. 167.

114. MANDAMUS—Communication With United States. —Mandamus held to lie to compel the surveyor general to do his duty under Pol. Code, § 3406, relative to communication with the United States land office on application being made for purchase of lands mentioned in section 3398.—Alberger v. Kingsbury, Cal., 91 Pac. Rep. 674.

115. MARINE INSURANCE—Sue and Labor Clause.—A sue and labor clause in a marine policy insuring a tug against liability for loss or damage to tows held not applicable to expense incurred in defending the tug itself

against a suit to establish such liability which was unsuccessful.—Munson v. Standard Marine Ins. Co., U. S. C. C. of App., First Circuit, 156 Fed. Rep. 44.

116. MARSHALLING ASSETS AND SECURITIES—General Rule.—The rule as to marshalling assets if one creditor can resort to two funds and another creditor only to one of them is subject to the limitation that such marshalling must not be applied to the detriment of a third person with an equity equal to or greater than that of the creditor —Mulherin v. Porter, Ga., 58 S. E. Rep 60.

117. MASTER AND SERVANT—Assumed Risk.—Where a servant continues to work with knowledge that the instrumentality is dangerous, but after command of the master and his assurance of safety, the question of assumption of risk is for the jury.—Bush v. West Yellow Pine Co., Ga., 58 S. E. Rep. 529.

118. MASTER AND SERVANT—Assumed Risk.—An employee does not assume an extraordinary risk existing by the fault of his employer, unless such employee knows or comprehends it or it is so plainly observable that he will have been charged with notice thereof.—Place v. Grand Trunk Ry. Co , Vt., 67 Atl. Rep. 545.

119. MASTER AND SERVANT—Contract of Employment.—Where a merchant contracts with a salesman for a year at a fixed salary, and thereafter refuses to perform the contract unless the salesman will accept a commission on sales, the salesman is not required to accept such change that his earnings might diminish the damages from the breach of contract.—Americus Grocery Co. v. Roney, Ga., 58 S E. Rep. 462.

120. MASTER AND SERVANT—Injury to Servant.—A car dispatcher of an interurban electric railway company held under the facts a vice principal and not a fellow servant of conductors and motormen.—Edge v. Southwest Missouri Electric Ry. Co., Mo., 104 S. W. Rep. 90.

121. MASTER AND SERVANT—Liability for Servant's Torts.—To knowingly place a drunken conductor armed with a pistol and of bad habits in charge of a street railway car held negligence as a matter of law.—Savannah Eelectric Co. v. Wheeler, Ga., 58 S. E. Rep. 38.

122. MASTER AND SERVANT—Risks Assumed.—A servant having left his work and undertaken to perform that of another, the master held not liable for an injury received while so engaged.—Patterson v. North Carolina Lumber Co., N. Car., 58 S. E. Rep. 437.

123. MASTER AND SERVANT—Torts of Servant.—A cotton mill held liable in damages to one going on the mill property to entice away its employees and thrown into a pond of water, with the participation of its superintendent.—Fields v. Lancaster Cotton Mills, S. Car., 58 S. E. Rep. 608.

124. MONOPOLIES—Labor Conditions.—A demand for a closed shop by laborers held contrary to public policy.—A. R. Barnes & Co. v. Berry, U. S. C. C., S. D. Ohio, 156 Fed. Rep. 72.

125. MUNICIPAL CORPORATIONS—Assessments for Street Improvements.—Where property is not assessed for more than it is benefited by a street improvement or more than its proportionate share of the cost, complaint may not be made of the manner of arriving at the result.—*In re* City of Seattle, Wash., 91 Pac. Rep. 548.

126. MUNICIPAL CORPORATIONS — Change of Grade.—The measure of damages to abutting property caused by raising the grade of a street is the difference between the market value before and after the change.—City of Macon v. Daley, Ga., 58 S. E. Rep. 540.

127. MUNICIPAL CORPORATIONS—Obstructions in Street.—A violation of a reasonable ordinance limiting the amount of space in the street to be occupied by building material is, as against a pedestrian injured thereby, *per se* wrongful and negligent.—Bensel Const. Co. v. Homer, Ga., 58 S. E. Rep. 489.

128. MUNICIPAL CORPORATIONS—Ordinances.—That an ordinance of the City of St. Louis forbids the keeping open of meat shops for the sale of meat therein after 9 o'clock in the forenoon on Sunday, whereas Rev. St. 1899, § 2243, forbids the sale of goods, wares, or merchandise at any time on Sunday, held not to create a repugnancy between them within the meaning of Const. art. 9, § 23.—City of St. Louis v. De Lassus, Mo., 104 S. W. Rep. 12.

129. MORTGAGES — Purchase by Mortgagee.—A purchaser at an execution sale of premises, after the sale of the premises under a mortgage, such execution being based on a judgment rendered after the record of the mortgage, cannot impeach the purchase by the mortgagee at his own sale.—Payton v. McPhaul, Ga , 58 S. E. Rep. 50

130. NEGLIGENCE—Manufacture of Things Inherently Dangerous.—The manufacturer of a thing inherently dangerous, or which when applied to its intended use becomes dangerous, who sells it for such use, is liable in damages to any one who, without fault on his part, sustains injury which is the natural and proximate result of the manufacturer's negligence.—Kepp v. National Tube Co , U. S. C. C., D. N. J., 154 Fed. Rep. 121.

131. PATENTS—Anticipation.—Prior knowledge and use which will anticipate a later patent is not to be made out by a chance combination made without appreciation of the principle upon which the patent is based.—Western Tube Co. v. Rainear, U. S. C. C., E D. Pa., 156 Fed. Rep. 49.

132. PRINCIPAL AND AGENT—Bills and Notes.—Where the president of a corporation gives individually his note under seal and pledges as collateral stock in the corporation which is his own property, the debt cannot be enforced against the corporation.—Andrews Co. v. National Bank of Columbus, Ga., 58 S. E. Rep. 633.

133. PRINCIPAL AND AGENT—Relationship.—A contract, whereby the owner of an addition to a town gives another the exclusive sale of the same for 10 years, held to constitute a relation of principal and agent, and not to vest the agent with any interest in real estate.—Kimmell v. Powers, Okla , 91 Pac. Rep. 687.

134. PUBLIC LANDS—Railroad Grants.—Public lands reserved for the benefit of Indians at the date of a grant for railroad purposes held not covered by the grant, though released from the reservation at the time the railroad's line of definite location was filed.—United States v. Grand Rapids & I. R. Co., U. S. C. C., W. D. Mich., 154 Fed. Rep 131.

135. PUBLIC LANDS—Tide Lands. It is the duty of one making application to the public land commissioners for a public sale of tide lands to fully state the facts as to improvements, whether they are such as are contemplated by the statute or not.—State v. Ross, Wash., 9 Pac. Rep. 762.

136. RAILROADS — Companies Liable for Injuries.—Where both a lessor railroad and a lessee are sued for negligence of the lessee, a nonsuit should not be granted to the lessor unless it should also be granted to the lessee.—Jackson v. Southern Ry., Carolina Division, S. Car., 58 S. E. Rep. 605.

137. RAILROADS—Operation.—A steam railroad cannot be charged with negligence in not looking for and discovering hose laid across its tracks for the purpose of carrying water to extinguish a fire.—Clark v. Grand Trunk Western Ry. Co., Mich., 112 N. W. Rep. 1121.

138. RAILROADS—Wrongful Expulsion of Passenger.—A passenger who had paid his fare to a city under quarantine, and who left the train at a station in obedience to the order of the quarantine officer, has no cause of action against the railway company for a wrongful expulsion.—Baldwin v. Seaboard Air-Line Ry. Co., Ga., 58 S. E. Rep. 35.

139. RECEIVING STOLEN GOODS—Elements of Crime.—Though after committing larceny in an adjoining state the thief brings the stolen property into Georgia, he does not commit larceny in the state, and it is not, therefore a crime for one to receive in the state goods so stolen.—Golden v. State, Ga., 58 S. E. Rep. 557.

140. REMOVAL OF CAUSES — Foreign Corporations.—Every corporation has the absolute right to institute, maintain and defend in the federal courts and to remove

to those courts its suits in any other states in the cases and on the terms prescribed by the act of congress.—Butler Bros. Shoe Co. v. United States Rubber Co., U. S. C. C. of App., Eighth Circuit, 156 Fed. Rep. 1.

141. SALES—City Ordinance as Part of Contract.—Where plaintiff purchased a computing scale warranted to weigh correctly, it was his duty to have it inspected under a city ordinance, and, if found defective, to rescind the contract before loss accrued to him from its use—Wright v. Computing Scale Co., Wash., 91 Pac. Rep. 571.

142. SALES—Contract.—Where correspondence between the parties was treated by plaintiff as a contract, and he attempted to carry it out, he cannot thereafter claim that there was no contract between the parties.—Bailey Co. v. West Lumber Co., Ga., 58 S. E. Rep. 120.

143. SCHOOLS AND SCHOOL DISTRICTS—Vaccination of Pupils.—A rule of a school board of a city, providing that pupils before admission to the schools must be vaccinated, held not unreasonable, and will not be set aside by the courts.—Auten v. Board of Directors of Special School Dist. of Little Rock, Ark., 104 S. W. Rep. 180.

144. SPECIFIC PERFORMANCE—Enforcement Inequitable.—A contract by which a defendant agreed to convey to complainant an interest in all property acquired by him in Alaska held not specifically enforceable in equity because of its inequitable character and the gross inadequacy of the consideration.—Marks v. Gates, U. S. C. C. of App., Ninth Circuit, 154 Fed. Rep. 481.

145 SPECIFIC PERFORMANCE—Verbal Contract.—Specific performance of a verbal contract for the sale of land will be decreed where the purchaser has entered into possession and paid the consideration agreed upon.—Webb v. Marlar, Ark., 104 S. W. Rep. 144.

146. STREET RAILROADS—Running Cars at Dangerous Speed.—The running of a street car at a high and dangerous speed whereby a child in the exercise of due care was run over and killed renders the company liable to the parents in the absence of contributory negligence on their part.—Cytron v. St. Louis Transit Co., Mo., 104 S. W. Rep. 109.

147. SUBROGATION—Payment of Debt by Surety.—The equitable doctrine of subrogation is sufficiently broad to entitle a surety who has paid the debt of his principal to the remedies which the creditor had not only against the principal, but against others who are equitably liable for the debt.—National Surety Co. v. State Sav. Bank, U. S. C. C. of App., Eighth Circuit, 156 Fed. Rep. 21.

148. TAXATION—Tax Deed.—Where a tax deed shows on its face that several lots in the town were sold at one sale, and that the county purchased them as a competitive bidder, the deed is void.—Keller v. Hawk, Okla., 91 Pac. Rep. 778.

149. TELEGRAPHS AND TELEPHONES — Contract for Transmission.—A contract for sending a telegram is made with the sender, and any action by the sendee for delay in delivery must be an action *ex delicto* for negligent breach of public duty.—Western Union Telegraph Co. v. Cooper, Ga., 58 S. E. Rep. 517.

150. TELEGRAPHS AND TELEPHONES—Delay in Delivering Message. — While a telegraph company is bound promptly to deliver a message sent in cipher if it undertakes to transmit it, it is not chargeable with the knowledge of the meaning of the words.—Bashinsky v. Western Union Telegraph Co., Ga., 58 S. E. Rep. 91.

151. TELEGRAPHS AND TELEPHONES—Delay in Delivering Message.—Unexplained delay in delivery of a telegram for nearly 17 hours raises the question of willfulness.—Dempsey v. Western Union Telegraph Co., S. Car., 58 S. E. Rep. 9.

152. TELEGRAPHS AND TELEPHONES—Delay in Delivering Message.—An addressee of a telegram in an action for damages makes out a case by proving long delay in delivery and damages resulting therefrom.—Kirby v. Western Union Telegraph Co., S. Car., 58 S. E. Rep. 10.

153. TENDER—Payment Into Court.—Where mortgagor offered in court to pay the mortgage debt, but mortgagee refused to accept the amount offered, contending that more was due, mortgagee cannot thereafter complain that the tender was not good because the money was not paid into court.—Strickland v. Clements, Ark., 104 S. W. Rep. 175.

154. TRUSTS—Constructive Trusts —To create a trust in favor of an intended beneficiary it must appear that decedent relied on the promise of the heir to carry into effect an intended devise in favor of the beneficiary.—Tyler v. Stitt, Wis., 112 N. W. Rep. 1091.

155. TRUSTS—Expressed Trusts.—Where a wife acknowledged holding the title to land purchased with money furnished by her husband and thereby created an express trust in his favor, limitations did not run against his right to enforce the trust until her disavowal of its existence.—Dixon v. Dixon, N. Car., 58 S. E. Rep. 604.

156. TRUSTS—Suit in Equity.—To a suit in equity to hold a trustee liable for discharging a lien in favor of the complainant as beneficiary, the debtor is not a necessary nor proper party, where defendant by a release had fully discharged it from any liability over.—Dodge v. Frank Waterhouse & Co., U. S. C. C., W. D. Wash., 156 Fed. Rep. 577.

157. USURY—Persons Entitled to Plead.—Defendants not being creditors, nor in privity with plaintiff's debtor, under a contract sued on, held not entitled to avail themselves of the defense that the contract was usurious.—Grubb v. Stewart, Wash., 91 Pac. Rep. 562.

158. VENDOR AND PURCHASER—Vendor's Lien.—The laws of this state will govern the rights of nonresident heirs of an intestate who was a nonresident in an action brought by them against a resident defendant on notes given the intestate for the purchase price of land in this state and to enforce a lien thereon.—Chisholm v. Crye, Ark., 104 S. W. Rep. 167.

159. WAREHOUSEMAN — Warranty of Warehouse Receipt.—For a breach of the warranty of a warehouse receipt that the articles presented are in existence and in the custody of the bailee, the purchaser may recover the price or proceed against the warehouseman at his option.—Livingston v. U. Anderson & Son, Ga., 58 S. E. Rep. 505.

160. WILLS—Construction.—Where a certain estate is given in unequivocal language in one clause of the will, the same cannot be cut down by a subsequent clause unless the language thereof is as unequivocal as the language of the first.—Sevier v. Woodson, Mo., 104 S. W. Rep. 1.

161. WILLS — Presumptions. — Where testatrix's wife bequeathed to him the interest on certain notes she held against him during his life, it would be presumed, in the absence of evidence to the contrary, that he assented to such bequest.—*In re* Church's Estate, Vt., 67 Atl. Rep. 549.

162. WILLS—Testamentary Capacity.—A person able to call to mind all his property and all the persons who came reasonably within the range of his bounty has testamentary capacity.—King v. Gilson, Mo., 104 S. W. Rep. 52.

163. WITNESSES—Fees of Expert.—As a physician cannot be required to make any examination or preliminary preparations, or to listen to the testimony to give his opinion as an expert, he may for such services demand extra compensation.—Schofield v. Little, Ga., 58 S. E. Rep. 666.

164. WITNESSES—Privileged Communications.—Letters passing between attorney and client reflecting on the business character of the client held not privileged as between them.—Stern v. Daniel, Wash., 91 Pac. Rep. 552.

165. WITNESSES—Who May Claim Privilege.—The plea of privilege with respect to communications of a decedent may be waived by the personal representative or heirs of decedent, where the character and reputation of decedent is not involved.—Appeal of Le Prohon, Me., 67 Atl. Rep. 317.